79-794

No.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ROBERT A. deVITO, M.D., Director
Illinois Department of Mental Health
& Developmental Disabilities,

Petitioner,

v.

JULIUS LANG, Conservator of DONALD LANG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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November 26, 1979

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The petitioner, Robert A. deVito, M.D., Director, Illinois Department of Mental Health and Developmental Disabilities, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Supreme Court entered in this proceeding.

OPINION BELOW

The opinion of the Illinois Supreme Court, reported at 76 Ill. 2d 311, 391 N.E. 2d 350 (1979) was filed May 24, 1979, and petitioner's request for rehearing was denied June 29, 1979.

The opinion of the Illinois Appellate Court for the First District is reported at 62 Ill. App. 3d 688, 378 N.E. 2d 1106 (1978). Both opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on May 24, 1979 and a timely Petition for Rehearing was denied on June 29, 1979. The mandate of the Court's judgment was stayed by that Court on July 18, 1979 on motion of the Director, petitioner herein, pending application for review to this Court. On September 27, 1979, Mr. Justice Stevens signed an order extending the time for filing this petition for certiorari to and including November 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether a ruling that a determination of unfitness to stand trial casts the defendant into a class defined as mentally ill for purposes of civil commitment violates the defendant's rights to equal protection and due process of law guaranteed by the Fourteenth Amendment to the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Illinois Mental Health Code of 1967, Section 1-11, Ill.Rev. Stat., Ch. 91½ Section 1-11 (repealed 1979):

> Section 1-11. "Person in Need of Mental Treatment", when used in this Act, means any person afflicted with mental disorder, not including a person who is mentally retarded, as defined in this Act, if that person, as a result of such mental disorder is reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs. This term does not include a person whose mental processes have merely been weakened or impaired by reason of advanced years. (As amended by HB 992, approved September 12, 1969 and HB 1996, approved August 18, 1972, effective January 1, 1973.)

Illinois Mental Health and Developmental Disabilities Code of 1978, Section 1-119, Ill. Rev. Stat., Ch. 91½ Section 1-119 (1979):

> Section 1-119. "Person subject to involuntary admission," or "subject to involuntary admission" means:
>
> (1) A person who is mentally ill and who because of his illness is reasonably expected to inflict serious physical harm upon himself or another in the near future; or
>
> (2) A person who is mentally ill and who because of his illness is unable to provide for his basic physical needs so as to guard himself from serious harm. . .

Illinois Mental Health and Developmental Disabilities Code of 1978, Section 4-500, Ill. Rev. Stat., Ch. 91½ Section 4-500 (1979):

> Section 4-500. A person 18 years of age or older may be admitted to a facility upon court order under this Article if the court determines:
>
> (1) That he is mentally retarded; and

(2) That he is reasonably expected to inflict serious physical harm upon himself or another in the near future.

Illinois Revised Statutes, Ch. 38 Section 1005-2-1:

"Fitness for Trial or Sentencing."
(a) For the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable:

(1) to understand the nature and purpose of the proceedings against him; or

(2) to assist in his defense.

Illinois Revised Statutes, Ch. 38 Section 1005-2-2:

"Defendant found unfit; commitment and release."
(a) If the defendant is found unfit to stand trial or be sentenced, the court shall remand the defendant to a hospital, as defined by the Mental Health Code of 1967, and shall order that a hearing be conducted in accordance with the procedures, and within the time periods, specified in such Act. The disposition of defendant pursuant to such hearing, and the admission, detention, care, treatment and discharge of any such defendant found to be in need of mental treatment, shall be determined in accordance with such Act. If the defendant is not ordered hospitalized in such hearing, the Department of Mental Health and Developmental Disabilities shall petition the trial court to release the defendant on bail or recognizance, under such conditions as the court finds appropriate, which may include, but need not be limited to requiring the defendant to submit to or to secure treatment for his mental condition.

STATEMENT OF THE CASE

Donald Lang is an illiterate deaf mute who has been arrested and charged with murder on two separate occasions. The issue of fitness to stand trial predictably arose in both criminal actions. The instant petition seeks review of a decision made in the course of proceedings involving the second murder, allegedly committed in July of 1971.

In those proceedings, the attorney for Donald Lang requested that Lang be tried with special precautions to compensate for Lang's inability to communicate. The request for a trial was granted which resulted in a jury convicting defendant Lang and sentencing him to 14 to 25 years' imprisonment. After an Illinois appellate court reversed the conviction on the grounds that no trial procedures could effectively compensate for the handicap of a deaf mute with whom there could be no communication, the cause was remanded for a fitness hearing pursuant to Illinois statute, Ill. Rev. Stat., Ch. 38 Section 1005-2-1, 1005-2-2 (1975).

At the fitness hearing held March 25, 1976, Lang was found to be unfit to stand trial and the trial court remanded him to the Department of Mental Health and Developmental Disabilities (DMHDD) for a hearing on Lang's need for involuntary admission to a state mental health or developmental disabilities facility. Lang was placed in a DMHDD facility where he was evaluated and determined not to be a person in need of mental treatment as that term was defined in the Mental Health Code, Ill. Rev. Stat., Ch. 91-1/2 Section 1-11 (1975). A hearing was held on December 8, 1976 in which the trial judge determined that although Lang had clearly manifested dangerous behavior, he was not in need of mental treatment and not mentally retarded:

> Because the testimony of the State's witnesses failed to provide clear and convincing evidence to support a finding that Lang is suffering from a mental disorder or that he is mentally retarded, the court has before it insufficient evidence to so find and have him hospitalized under the Mental Health Code See p. App. 19 of Appendix hereto.

The court went on to find:

> In Lang's case we have a person who is unfit to stand trial because of a combined physical and mental condition; but who does not have a clearly diagnosed mental disorder and who is not mentally retarded, although he has demon-

> strated violent behavior in the past. Present Illinois law does not permit commitment of a person unfit in the statutory sense who has demonstrated violent behavior in the past but who is mentally retarded or suffering from a mental disorder.
>
> See p. App. 21 of Appendix hereto.

As the trial court could not civilly commit Lang, it instead ordered Lang released on bail pursuant to Ill. Rev. Stat., Ch. 38, Section 1005-2-2(a) above cited. As a condition of bond, however, Lang was ordered to continue in a training program and reside in a secure setting. In the same order, the trial court ordered DMHDD to collaborate with Lang's attorneys in developing a program appropriate to Lang's needs. See p. App. 24 of Appendix hereto. In an attempt to comply with the trial court's order of December 8, 1976, DMHDD continued to maintain care and custody of Lang on the basis of the application for voluntary admission of the defendant made on Lang's behalf, all the while maintaining however, that Lang was not in need of hospitalization.[1] Over the conservator's objection, the trial court gave DMHDD permission to discharge Lang in October of 1977. At that time, Lang was discharged to Cook County Jail where he is presently incarcerated, receiving no therapy.

In the October 1977 order granting DMHDD permission to discharge Lang, the trial court also issued a writ of mandamus directing Robert A. deVito, M.D., Director of DMHDD (Director) to create and implement an adequate and humane care and treatment program for Lang. See p. App. 37 of Appendix hereto. DMHDD appealed the mandamus. The appellate court, relying on recent decisions construing the role of DMHDD with regard to the unfit defendant, vacated the

[1] From July, 1977 to the present, the conservator has been allowed to be represented by counsel and file motions on behalf of Donald Lang, despite the representation already provided him by the Cook County Public Defender.

writ of mandamus and held that DMHDD could not be required to house a defendant during lengthy bail proceedings once it is determined that that defendant is not in need of mental treatment and is not mentally retarded. See p. App. 53 of Appendix hereto.

The conservator appealed the decision of the appellate court to the Illinois Supreme Court which affirmed the decision of the appellate court, vacating both the writ of mandamus and the order of the trial court requiring DMHDD to provide a program for Lang. See p. App. 90 of Appendix hereto. The court went beyond a simple affirmance of the appellate court decision, however, and set new prerequisites for involuntary commitment of the unfit defendant to a state mental health or developmental disabilities facility. The court stated that the difficulty of interfacing the criminal justice system with the mental health delivery system was exacerbated by:

> . . .the accepted belief in Illinois that the unfitness standards are different from the standards for involuntary commitment.
>
> See p. App. 82 Appendix hereto.

The opinion recognized that the Illinois General Assembly was also grappling with the problems the unfit defendant posed for the criminal justice and mental health delivery systems. However, as no new legislation had been enacted at the time the court's opinion was rendered, the court was forced to rely only upon presently enacted statutory law on its considerations.[2] The

[2] On November 9, 1979, Illinois Governor James R. Thompson received Senate Bill 0133 from the Illinois General Assembly. The bill is currently awaiting the Governor's signature for certification prior to becoming effective. Senate Bill 0133 repeals those provisions of the Unified Code of Corrections that govern the determination that a criminal defendant is unfit to stand trial and the subsequent diversion of that defendant for treatment (Ill. Rev. Stat., Ch. 38 Section 1005-2-1 and Section 1005-2-2). The bill appears in the Appendix hereto.

(Footnote continued on following page.)

court noted that the Illinois Mental Health Code of 1967 had recently been repealed by the Mental Health and Developmental Disabilities (MHDD) Code of 1978. The 1978 Code

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(Footnote continued from preceding page.)

Senate Bill 0133 provides for an examination and ultimate determination of the defendant's fitness, once the issue of fitness is raised in the criminal proceedings. If found to be unfit, the defendant's condition is assessed as to the nature of the disability that renders him unfit. (Section 104-13) A hearing is then held at which time it is determined whether there exists a substantial probability that the defendant will attain fitness within one year. If such a possibility exists, the court may order the defendant to undergo treatment for the purpose of rendering him fit. (Section 104-16) If the unfitness is due to a mental disability, the DMHDD may be ordered to take custody of the defendant. If the unfitness is due to a physical disability, the Division of Vocational Rehabilitation (DVR) will be ordered to supervise the treatment of the defendant. (Section 104-17)

Ninety days after the order placing the unfit defendant in a treatment program, the issue of fitness is to be re-examined. If found fit, the court may order the defendant to trial. If not fit, the court may continue its original order for treatment, if progress toward attaining fitness is evidenced. (Section 104-20)

The bill provides that by motion either the defendant or the state may ask the court for an order compelling a trial with special provisions to compensate for the disabilities of the unfit defendant. (Section 104-22) Also, the court on its own initiative may enter such an order. If no provisions could compensate for the disability, a defendant may move or a court may require a discharge hearing to take place. (Section 104-23) At the hearing the court will hear evidence to determine whether the unfit defendant could be found guilty beyond a reasonable doubt or not guilty by reason of insanity. If the evidence does not support either finding, the court must acquit the defendant. (Section 104-25)

If no acquittal can be granted, the defendant can be remanded for further treatment and depending on the severity of the charges, the one year limit for treatment may be extended. At the end of the extended period of treatment, the court has various options available to it: (a) If the defendant is determined fit, the court can proceed to trial; (b) If the defendant remains unfit, he is to be remanded to

made certain changes in the terminology of the provision defining the standard for involuntary commitment, formerly Section 1-11, above cited. Specifically, the court recognized that the requirement of a showing of a "mental disorder" prior to involuntary commitment had been replaced by a requirement of a showing of "mental illness" which was left undefined in the MHDD Code. From this change in terminology, the court concluded that the prerequisite showing of a mental disorder prior to involuntary commitment had been totally removed. The court held:

> Hereafter, if a person is found unfit to stand trial, he should be considered to be mentally ill under the MHDD Code unless his unfitness is due to a solely physical condition. If that person also meets the dangerousness requirement of the Code, he should be considered to be a 'person subject to involuntary admission.'
>
> See p. App. 85 of Appendix hereto.

HOW FEDERAL QUESTION IS PRESENTED

In a Petition for Rehearing filed by Director deVito, DMHDD argued that the ruling of the Illinois Supreme Court constituted a new and unanticipated construction of the 1978 Illinois Mental Health and Developmental Disabilities Code

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(Footnote continued from preceding page.)

DMHDD for a hearing pursuant to the MHDD Code to determine if he is a person subject to involuntary admission; (c) If the defendant is committed at the hearing, the court will drop the criminal charges and the defendant will be treated as any other civilly committed patient; (d) If the defendant is found not to meet the criterion for involuntary admission and is therefore not committable, the court must determine whether the defendant is dangerous. If found to be dangerous, the unfit defendant, though not committable under the MHDD Code will be remanded to DMHDD or DVR for an additional period of treatment, the length of which is to be governed by the severity of the charge; or (e) If the unfit defendant is not found to be dangerous, the court must order him released.

which threatens rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The Illinois Supreme Court refused to grant the Petition, but did alter some language in its opinion, presumably based upon the arguments made in said Petition.

Director deVito seeks to come within the exception to the general rule that an attempt to raise a federal question upon a petition for rehearing comes too late. The exception, as recognized by this court, is that a federal question respecting the validity of a statute as applied by the state court is timely raised if the unanticipated ruling threatens rights under the Constitution and a petition for rehearing presents the first opportunity for raising it. *Herndon* v. *Georgia*, 295 U.S. 441, 443, 55 S.Ct. 794 (1935).

The new construction given the standard for involuntary commitment of the unfit defendant not only was unanticipated but also threatens rights guaranteed by the Fourteenth Amendment to due process and equal protection. The ruling of the Illinois Supreme Court allows for commitment of the unfit defendant without any evidence of mental illness required for all other involuntary commitments. The Petition for Rehearing was the first opportunity for raising the federal question herein presented. The question was therefore timely raised.

STANDING OF THE DIRECTOR

The Director is petitioning this court for a writ of certiorari as the chief administrative officer of the Illinois DMHDD. DMHDD is mandated to provide humane care and treatment to all persons remanded to its custody. Ill. Rev. Stat., Ch. 91½ Section 100-7 (1977). The unfit defendant who is found to be a person subject to involuntary admission and who is thereafter committed to DMHDD for treatment has a substantial relationship to the Director and DMHDD.

The Illinois Supreme Court's decision, by declaring the unfit defendant to be mentally ill and, if dangerous, subject to involuntary admission deprives these defendants of the right guaranteed by the Fourteenth Amendment to be civilly committed under the standards governing all other civil commitments.

This court has recognized certain exceptions to the general rule that a party may not claim standing to vindicate the constitutional rights of some third party. See: *Barrows* v. *Jackson*, 346 U.S. 249, 73 S.Ct.1031(1953); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45S.Ct.571(1925); *Griswold* v. *Connecticut*, 381 U.S. 479, 85S.Ct.1678(1965); *Eisenstadt* v. *Baird*, 405 U.S. 438, 92S.Ct.1029(1971). The exceptions arise when one of three factors are seen in a given factual situation: (1) the presence of a substantial relationship to a third party; (2) the impossibility of the right holders' asserting their own constitutional rights; and (3) the need to avoid dilution of third parties' rights.

The instant cause fits squarely within the recognized exceptions to the rule governing standing. Director deVito must be seen to have standing to vindicate the rights of unfit defendants committed to the care and custody of the agency he administers.

REASONS FOR GRANTING THE WRIT

I.

THE ILLINOIS SUPREME COURT ERRONEOUSLY EQUATED UNFITNESS TO STAND TRIAL WITH MENTAL ILLNESS FOR PURPOSES OF CIVIL COMMITMENT

The Illinois Supreme Court recognized that up until the time of its decision in *Lang*, "the accepted belief" in Illinois had been that the standards for unfitness to stand trial differed from the standards for involuntary commitment. The Illinois Court

failed to recognize, however, that the so-called "accepted belief" was founded upon intensive psychiatric study and opinion which ultimately were reflected in the law.

Two separate bodies of law govern the issues of unfitness and civil commitment: the Unified Code of Corrections (UCC), Ill. Rev. Stat., Ch. 38 Section 1005-2-1, and the Mental Health and Developmental Disabilities Code (MHDD Code), Ill. Rev. Stat., Ch. 91½ Section 1-100 *et seq.* The UCC, following the decision of this Court in *Dusky* v. *U.S.*, 362 U.S. 402, 80 S.Ct. 788 (1960), provides that a defendant is unfit to stand trial if, because of a mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or assist in his defense.

The MHDD Code defines the standard for involuntary admission to a mental health or developmental disabilities facility. The definition is two pronged and requires that a person be (1) mentally ill and (2) reasonably expected to inflict serious physical harm upon himself or another in the near future because of that mental illness. Ill. Rev. Stat., Ch. 91½ Section 1-119. Similarly, a person diagnosed as mentally retarded may be involuntarily admitted if he is reasonably expected to inflict serious physical harm upon himself or another in the near future. Ill. Rev. Stat., Ch. 91½ Section 4-500.

As can be seen from the foregoing, the standard for adjudicating a person unfit to stand trial is substantially different from the standard for involuntary commitment. The difference in the two standards is based primarily on the different goals sought to be furthered by a finding either of unfitness to stand trial or that a person is subject to involuntary admission.

A finding of unfitness postpones criminal proceedings against a defendant due to a current inability to effectively participate in those proceedings. The goals sought to be

furthered by the postponement include allowing the defendant to provide full assistance in developing the "true facts" of the case and insuring that the fundamental fairness of the trial proceedings is not compromised. S. Brackel and R. Rock, The Mentally Disabled and the Law, Revised Edition, 408 (1971).

On the other hand, a finding that a person is subject to involuntary admission is made in order to place that person in the custody of a service provider so that a program of treatment or habilitation may be developed and administered to the individual. In this way, society is able to treat and care for the mentally disabled while at the same time protecting its own members from potential harm. *Addington* v. *Texas*, ____ *U.S.* ____, *99 S.Ct. 1804, 1871 (1979).*

As different goals are sought to be furthered and different standards established for findings of unfitness and mental illness, it is erroneous to equate the two. Just as every mental illness will not cause the defendant to be unfit to stand trial, the fact that a defendant is unfit should not be seen as a justification for finding him mentally ill for purposes of civil commitment. The issues must remain separate. See: S. Brackel and R. Rock, The Mentally Disabled and the Law, Revised Edition, 415 (1971); Note, Incompetency to Stand Trial, 81 Harvard L. Rev. 460 (1967); National Institute of Mental Health, Competency to Stand Trial and Mental Illness (1977); Roby, Criteria for Competency to Stand Trial; A Checklist for Psychiatrists, American Journal of Psychiatry, 122:616-622 (1965).

The Illinois Court's decision will affect not only Donald Lang, but all those defendants who will be found unfit to stand trial. If the Court's decision is allowed to stand, all unfit defendants whose unfitness is not attributable to a physical condition will automatically be declared mentally ill. One prong of two pronged test for involuntary commitment will therefore be met without the hearing on the issue otherwise granted to the person who is alleged to be subject to in-

voluntary admission. If also found dangerous, the unfit defendant will be committed.

Commitment based upon a finding of dangerousness alone poses grave problems for the service provider. The mandate of DMHDD is to provide humane care and treatment to all individuals committed to its custody. Ill. Rev. Stat., Ch. 91½ Section 100-7 (1977). By ordering civil commitment of individuals to DMHDD without a showing of mental illness but simply because of dangerous tendencies, the court forces the service provider to become the mere custodian. Treatment for mental illness is impossible where no mental illness is demonstrated. The true function of the mental health facility is compromised by equating mental illness with unfitness, the grave danger being that a department of mental health be seen and utilized as an arm of the department of corrections.

In consideration of the foregoing, certiorari should be extended to clarify the proper distinction between a finding of unfitness to stand trial and a finding that a person has a mental illness that would subject him to involuntary commitment.

II.

EQUAL PROTECTION OF THE LAW IS DENIED THE DEFENDANT FOUND UNFIT WHO IS AUTOMATICALLY CLASSIFIED AS MENTALLY ILL FOR PURPOSES OF CIVIL COMMITMENT

In Illinois, the MHDD Code provides that a person is subject to involuntary admission if that person is (1) mentally ill and (2) because of that mental illness is reasonably expected to inflict serious physical harm upon himself or another in the near future. Ill. Rev. Stat., Ch. 91½ Section 1-119 (1979). A person may be committed to DMHDD or a private facility, however, only if after a hearing it is determined that the above

mentioned standard has been met by clear and convincing evidence. Ill. Rev. Stat., Ch. 91½ Section 3-808 (1979).

The decision of the Illinois Supreme Court in *Lang* changes the criterion for involuntary admission of the unfit defendant. The State will solely be required to prove by clear and convincing evidence that the defendant is dangerous to himself or others. If the burden is successfully borne by the State, the unfit defendant will be committed. The issue of the presence of a mental illness will never be addressed in the commitment proceedings.

As the requirements for civil commitment of the unfit defendant are lessened by classifying the latter group as mentally ill, an issue arises concerning the denial of equal protection of the law.[3] In *Baxstrom* v. *Herold*, 383 U.S. 107, 86 S.Ct. 760 (1966) this Court recognized that:

> Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.
> 383 U.S. 107, Ill.

Following the holding in *Baxstrom, supra*, it becomes necessary to question the relevance of classifying as mentally ill for purposes of civil commitment those persons who are unfit to stand trial. As has been argued above, unfitness and mental illness are distinct issues, both of which address different goals and are defined by different standards. Classification of the defendant as unfit to stand trial has no relevance to showing whether that defendant is mentally ill for purposes of civil commitment. *Baxstrom* v. *Herold*, 383 U.S. 107, 111, 86 S.Ct. 760 (1966).

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[3] Senate Bill 0133, in that it allows for DMHDD to maintain custody of the unfit defendant who has been found to be dangerous but not subject to involuntary admission, raises the same issues of denial of equal protection. Section 104-25 (f)(3).

The mere filing of a criminal charge cannot suffice to justify depriving the unfit defendant of a judicial determination on the basic question of whether he was mentally ill for purposes of involuntary admission. *Humphrey* v. *Cady*, 405 U.S. 504, 408, 92 S.Ct. 1048 (1972); *Jackson* v. *Indiana*, 406 U.S. 715, 724, 92 S.Ct. 1845 (1975).

This Court's decision in *Baxstrom* v. *Herold*, *supra*, prohibits a State from withholding from a few the procedural protections or substantive requirements for commitment that are available to all others. Certiorari should be granted to resolve the question of what procedural and substantive requirements must be followed in civilly committing the unfit defendant.

III.

DUE PROCESS REQUIRES THAT A SEPARATE FINDING OF MENTAL ILLNESS BE MADE PRIOR TO CIVIL COMMITMENT OF THE UNFIT DEFENDANT

It has been widely recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *Addington* v. *Texas*, ____ *U.S.* ____, *99 S.Ct. 1804 (1979)*; *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486 (1975). The decision of the Illinois court in *Lang*, has compromised the due process protection of the unfit defendant who is civilly committed for treatment. As is argued above, the defendant found to be unfit to stand trial will not be entitled to a hearing on the issue of whether he has a mental illness for purposes of civil commitment. Instead, the sole determinant of whether an individual will be subjected to involuntary admission is dangerousness.

The Illinois General Assembly in enacting the MHDD Code, set specific procedural requirements to be followed as a prerequisite to involuntary commitment. Ill. Rev. Stat., Ch.

91½ Section 3-700 through 3-819 (1979). By indiscriminately revoking a major portion of those procedureal protections from the unfit defendant, the Illinois court has violated the fundamental requirements of due process. *O'Connor* v. *Donaldson*, 422 U.S. 563, 583, 95 S.Ct. 2486 (1975) (concurrence by Burger, J.); *In Re Gault*, 387 U.S. 1, 19, 87 S.Ct. 1428 (1967). Less stringent procedural protections in commitment proceedings cannot be justified by the mere fact of a criminal charge. *Jackson* v. *Indiana*, 406 U.S. 715, 730, 92 S.Ct. 1845 (1972). The Illinois court's opinion in *Lang* creates unnecessary, unfair and unconstitutional distinctions among those alleged to be subject to involuntary admission.

The court should grant certiorari to resolve the issue of what due process protections are to be afforded the unfit defendant in civil commitment proceedings.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department—County Division

IN THE MATTER OF
DONALD LANG }

OPINION

INTRODUCTION

The respondent, Donald Lang, was charged with the murder of Earline Brown on July 26, 1971.

The respondent was deaf and had never been taught to read, write or to use sign language and was unable to communicate in any language. In January, 1972, Lang was tried, convicted and sentenced to 14 to 25 years. On February 14, 1975, the Appellate Court reversed his conviction on the grounds that his conviction was constitutionally impermissible absent trial procedures to effectively compensate for his disabilities.

On March 25, 1976, the Honorable Louis B Garippo adjudged Lang unfit to stand trial and ordered him remanded to the custody of the Department of Mental Health for a hearing under provisions of the Mental Health Code as provided for under Section 1005-2-2 of the Unified Code of Corrections. The issue then becomes whether or not Lang is a person who is in need of mental treatment, as defined in Section 1-11 of the Mental Health Code or whether he is mentally retarded and dangerous to himself or others as defined under Section 1-12 of the Mental Health Code.

FACTS

The State presented the following evidence:

Lang was observed entering the Viceroy Hotel on July 25, 1971 with a woman identified as Earline Brown. Once inside, Miss Brown requested a room and was given the key to Room 201. Several hours later Lang was seen returning to the lobby of the hotel alone, he left the room key at the desk and then left the hotel. Shortly thereafter a hotel maid discovered pillows and linens missing from the bed in Room 201 and replaced them. She did not see anyone else in the room. The room was later rented to another couple that night but nothing had been reported as unusual. The next day another couple discovered the body of Earline Brown in the closet of Room 201. Exhibits and testimony indicated she had been beaten about the head, face and neck and upper chest. Cause of death was asphyxiation. Lang was arrested that same day for the murder of Earline Brown. During the course of the interrogation of Lang, brown stains were noted on his pants and sock. The report and testimony of the laboratory technician was that the stains found were of the same blood type as the deceased (Type B) and different than Lang's blood type (Type O).

The police officers testified that they knew Lang was deaf and attempted to inform him of his legal rights through the use of written and oral communication. Lang was interviewed alone by the police although his father was at the police station during part of the time the police were with Lang. The police testified that Lang made a drawing in their presence during the course of the interview. There was also evidence of another drawing found in the interrogating room, but the police did not know if Lang drew it nor did they show it to him. Lang was shown a photograph of the victim but made no response or gesture.

The State also presented three expert witnesses relating to Lang's mental status.

Dr. A. Arthur Hartman, a registered clinical psychologist and currently Director of the Department of Psychology of the Psychiatric Institute of the Circuit Court of Cook County, testified that he attempted to administer psychological tests on three occasions to Lang. On August 16, 1971, Dr. Hartman classified Lang as a mental defective with an estimated age level of about seven. Dr. Hartman noted marked impulsivity and irritability during the examination which he considered to be associated or indicative of aggressive behavior under stress. The next occasion on which Dr. Hartman attempted to examine Lang was February 25, 1976. Although Lang's responses to the tests were insufficient to consider them valid, Dr. Hartman's opinion was that Lang continued to be classified as mentally defective with a permanent severe limitation in communication. On September 24, 1976, Dr. Hartman again found him to be mentally retarded and functioning at a seven year level, with additional severe limitation in language and symbolic functions which he characterized as aphasia. Dr. Hartman said his mental age approximation was subject to reservations on the basis of variable cooperation and specific disabilities limiting communication.

Dr. Robert Reifman, Assistant Director of the Psychiatric Institute of the Circuit Court of Cook County, and a board certified psychiatrist, testified that he had examined Lang on three occasions. On August 16, 1971, he examined Lang and made a diagnosis of mental retardation with explosiveness and as a result was not mentally fit to stand trial. On June 16, 1976, a diagnosis of mental retardation with explosiveness was made and Dr. Reifman further indicated he was dangerous to others. On September 24, 1976, Dr. Reifman examined Lang again and reached the same diagnosis. On one occasion Dr. Reifman stated that because Lang never learned the use of language it would indicate serious cognitive disturbances which could be considered schizophrenic.

Dr. Reifman also looked upon Lang's guardedness and suspiciousness as disturbances of perception. The emphasis of Dr. Reifman's testimony was that Lang was retarded and dangerous with some speculation but little emphasis that Lang suffered from a mental disorder.

Dr. Joseph Garvin, a registered clinical psychologist examined Lang on June 14, 1976. He was only able to use a limited number of items from psychological tests and based upon Lang's performance and general level of comprehension, Dr. Garvin diagnosed Lang as mentally retarded with an I.Q. of 50 to 60 and mental age of 7 years. Dr. Garvin also found a degree of emotional disturbance, impulsivity and some agitation that he was reluctant to categorize diagnostically other than a behavioral reaction or an emotional reaction.

All three expert witnesses called by the State testified that in their opinion Lang was dangerous to others and on the basis of a hypothetical question the experts testified that he was likely to be dangerous to himself or others in the future as a result of his mental retardation.

The following witnesses testified on behalf of the respondent Lang.

Dr. Edward Page-El, a neurologist and pediatrician at the Illinois Institute of Developmentai Disabilities, whose major portion of work involves the evaluation and diagnosis of mentally retarded persons and persons with other neurological deficits. Dr. Page-El gave Lang a neurological examination and found him deaf but not mentally retarded. Dr. Page-El tested Lang after establishing a rapport with him over a period of time and after receiving instructions from Dr. Robert Donoghue in administering the Block Design Test of the Wechsler Adult Intelligence Scale. Dr. Page-El found Lang to have an I.Q. in the range of 82-100.

Dr. Jewett Goldsmith, a board certified psychiatrist and the Clinical Director of the Forensic Psychiatry Program at the Illinois State Psychiatric Institute, testified that he had been able to observe Lang on a day-to-day basis for about seven months. Dr. Goldsmith did state however, that while he did not consider Lang to be mentally retarded or mentally ill he did feel Lang was suffering from a mental disorder but not from any type of psychosis or neurosis. Dr. Goldsmith could not give a specific diagnosis because he wasn't sure that Lang's behavior was maladaptive as the term was ordinarily used or whether it was adaptive behavior because of his handicap.

Dr. Goldsmith testified that if it were not for Lang's communication problems he had no reason to expect him to have a learning disability and that since communication therapy began in June, 1976, Lang has made significant progress in terms of learning signs. Dr. Goldsmith testified that there were several times when Lang had to be physically restrained. On one occasion Lang struck a staff member and another time he struck a security officer.

Dr. Robert J. Donoghue, a school and registered clinical psychologist with a Ph.D. in the psychology of the deaf also examined Lang. Dr. Donoghue had tested between 2,000 and 3,000 deaf persons. Among them were many who did not know sign language. Dr. Donoghue, who is also deaf, stressed the importance when testing deaf individuals of establishing a rapport with the individual before beginning testing, and also being able to communicate to that individual what it is you want him to do. Dr. Donoghue stated that when evaluating test results he would not make a judgment merely on the basis of score but would also give important consideration to the testing environment.

Dr. Donoghue testified that one would not have to be deaf to psychologically test a deaf person but that it would be very debatable whether one who has a Ph.D. in clinical psychology

but little experience with deaf individuals would be able to evaluate the results. Dr. Donoghue stated that when a psychologist with limited or no experience in testing deaf individuals administers tests and obtains varying results, then the highest score should be considered as the most valid.

Dr. Donoghue stated that he had asked Dr. Page-El to administer the Wechsler Block Design Test to Lang for a number of reasons: Dr. Donoghue had observed that Dr. Page-El had established a good rapport with Lang; it is easy to get someone interested in the test because it looks like a game; and because the Block Design Test correlates the highest among the other subtests with the full intelligence test. Dr. Donoghue testified that for the Block Design Test to be a good test you must have established a rapport with the test taker and the test taker must be motivated. Dr. Donoghue stated that the Stanford-Binet test has been rejected by most psychologists of the deaf as a valid test instrument due to the problems in communicating the instructions. Dr. Donoghue administered the Bender-Gestalt test to Lang and found that Lang had an essentially normal personality; that there was impulsivity in Lang's actions; and that there was evidence of educational deprivation in some of his behavior. Based upon his observations of Lang, Dr. Donoghue diagnosed Lang as being not mentally retarded or mentally ill but socially and educationally retarded. Dr. Donoghue stated that Lang had very normal reactions and that based on Dr. Donoghue's many years of experience with non-verbal deaf and low intellect individuals there was no question that Lang was of at least average intelligence and possibly bright normal.

Dr. Donoghue stated that he is positive that Lang has the ability to make up his social and educational deficits. Dr. Donoghue testified that Lang did appear to have language, though not a language commonly understood by others but a language based on the pantomiming and mimicking of behaviorisms of other people. He believed that Lang does not realize

that he doesn't have a language which is commonly used. Dr. Donoghue stated that while Lang has deep communication problems, difficulty in communicating is not indicative of lack of intelligence. Dr. Donoghue testified that Lang does not have a permanent communication deficit and that given time and training under the appropriate surroundings Lang could engage in a normal conversation in three to five years. He stated that he believes that Lang has the ability to learn, basing his opinion on Lang's intelligence, his powers of observation, his ability to mimic, his good perceptive powers and his good memory.

Dr. Donoghue suggested that to accomplish such result, Lang must be placed in a sheltered environment free from the distractions of everyday life where he could devote his time to learning communicative skills.

John Schneir, a certified social worker with an M.A. degree in Social Work and currently employed at the Illinois State Psychiatric Institute, testified that since Lang came in March 1976 he began compiling a social history of Lang through communications with family members, social agencies and available records. Through this information Mr. Schneir testified that he learned; that Lang's last experience with formal education was at the age of 6; that Lang's first contact with the Department of Mental Health was in August of 1967 when Lang was sent to Dixon State School for the Retarded; that at Dixon, Lang was involved in several incidents dealing with females, the details of which were not clearly known; that Lang was transferred from Dixon to Lincoln State School for the Retarded; and then finally to Cook County Jail until he was released sometime in 1970. He then lived with his father for approximately 6 months until he was arrested; that from the time of his release until the time of his arrest he was employed; and that prior to coming to the Institute Lang had been previously diagnosed with conflicting results.

Mr. Schneir also testified as to his observations of Donald since he was brought to I.S.P.I. in March of 76. Mr. Schneir stated that when Lang was first brought to his unit he attempted to talk more and would make unrecognizable sounds, but now as a result of the communicative assistance given he attempts to communicate more with gestures and pictures. Mr. Schneir observed Lang to be an impatient individual at times who would pout if he didn't get his way. Mr. Schneir also observed that Lang would rather align himself with staff members or patients that functioned well rather than with those patients who were very psychotic or very retarded. Based upon the material compiled by Mr. Schneir and his observations he believed Lang as being not mentally retarded but very self-centered.

Joyce Johnson, a registered nurse with a specialty in psychiatric nursing and assistant head nurse of the Forensic Unit at I.S.P.I., testified that Lang was self sufficient, independent and cooperative on the ward; and that on one occasion several months ago, Lang had to be physically restrained but since that time he had not been placed in such restraints.

Susan Matti, a registered occupational therapist employed at the Illinois State Psychiatric Institute testified that she was responsible for the occupational therapy shop, and that it was her observation that Lang possessed a high skill level while working on craft projects and that Lang's gross and fine motor coordination were not impaired. Ms. Matti also testified that Lang actively participated in some group activities that required the use of his imagination; that Lang did use some formal sign language in her presence; that Lang exhibited above average skills for the patient population; and that he showed speed in grasping ideas. There was one occasion where Lang became upset and raised a wooden mallet above his head but did not harm anyone.

John La Bon, a recreational therapist at the Illinois State Psychiatric Institute, testified as to Lang's work in the occupational therapy shop and Lang's other activities since he was brought to the unit in March, 1976. Mr. LaBon testified that Lang successfully completed work on reassembling a chair and desk, stripping it down and repainting it, after he observed gestures showing him how it should be done. Mr. LaBon stated that Lang enjoyed working in the shop and in fact on one occasion became angry and made motions of wanting to fight with LaBon when he instructed him to return his tools due to the closing of the shop. Other observations of Lang by Mr. LaBon were that Lang followed the rules of various games that were played once they were communicated to him; that he assumed certain responsibilities on the unit including the cleaning of kitchen equipment and the distribution of food on his own initiative; that he restrained a patient after the patient made advancements to attack a housekeeper on the unit, and that since his communicational therapy lessons began he has increasingly used sign language to communicate and has in fact taught various signs to members of the staff.

Respondent's final witness was Rhoda Mae Haight a registered interpreter of the deaf, and author of numerous articles dealing with the development of sign language. Her parents were deaf and her first language was sign language. She testified she had been involved in many programs for the deaf throughout her life and has formally been a full time teacher of the deaf since 1960. Currently, she is employed in consultant, teacher and therapist capacities in various hospitals and institutions throughout Illinois. Ms. Haight has taught in a variety of settings to people with different needs and of all age groups. Based on her experience and unique knowledge in the field Ms. Haight was accepted by the court as an expert in the field of teaching of sign language.

Ms. Haight testified that she is currently employed by the Siegel Institute of Communicative Disorders of Michael Reese

Hospital as a consultant, teacher and therapist for Lang, and is presently engaged in teaching Lang communicative skills. Ms. Haight stated that she instructed Lang to stop attempting to communicate through verbal behavior which is unintelligible and instead communicate in a non-verbal manner. After initially beginning work with Lang in June, Ms. Haight introduced formal sign language material to him in September. A sign language book was used and by September 9, Ms. Haight discovered as a result of testing that Lang had learned 30 signs. At this time Ms. Haight also observed Lang teach staff members on the unit formal sign language, shaping their hands to form the correct diction. Ms. Haight left the book with Lang and on September 13 after testing Lang, she discovered that he had remembered the 30 signs he had previously learned and in fact had learned 20 more signs on his own from the book. At this point, Ms. Haight asked the staff to work with Lang on printed words.

Ms. Haight testified that when she met with Lang the following week she found that Lang had been very receptive to learning the printed words and observed that Lang was able to transfer sign symbols to printed symbols for the few words which she had given him. Her rule of thumb in teaching hearing adults of normal intelligence is to introduce 3 to 5 signs a lesson and eventually build up to 10 new signs a lesson. Someone of below average intelligence could not learn more than 1 to 3 signs a lesson. Based on her observations Ms. Haight stated that Lang had learned sign language faster than anyone she had ever taught before.

LEGAL ISSUES INVOLVED

The primary issue before this court is whether Lang is a person in need of mental treatment as defined in Ill. Rev. Stat., Ch. 91½, Sec. 1-11 (1975) of the Mental Health Code which states:

> . . . Any person afflicted with a mental disorder, . . . if that person, as a result of such mental disorder, is reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally, or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs.
> . . .

or if he is mentally retarded, and dangerous to himself or others as defined in Ill. Rev. Stat., Ch. 91½, Sec. 1-12 (1975) of the Mental Health Code which states:

> Section 1-12: "Mentally Retarded and Mental Retardation" refers to subaverage general intellectual functioning and generally originating during the developmental period and is associated with impairment in adaptive behavior. Impaired adaptive behavior may be reflected in delayed maturation or reduced learning ability or inadequate social adjustment.

The law in Illinois is that the State must meet their burden of proof of the criteria defined above by clear and convincing evidence. In *People* v. *Sansone,* 18 Ill.App. 3d 315, 309 N.E. 2d 733 (1974) the court stated:

> Where the issue involved is not the occurrence of an event, but the determination of an individual's mental condition, the State must prove that *the individual is in need of mental treatment by clear and convincing evidence. The facts upon which a medical opinion is based must be established by clear and convincing evidence and the medical testimony upon which the decision to commit is based must be clear and convincing. Id.* at 326 (emphasis added).

The court has searched for cases dealing with the deaf and the issues involved here but because of its uniqueness there is a paucity of legal precedents on which to rely. Therefore, it was necessary to rely upon clinical and professional commentaries by persons deemed experts in the field.

A review of some of the literature relating to the psychology of the deaf will give a necessary perspective before

applying the law to the evidence. From ancient times until the sixteenth century knowledge of the deaf, as with other handicapped groups, was based on ignorance and superstition. The deaf were considered as queer, comics, fools, idiots, doomed souls. Even Aristotle concluded that those who lacked hearing lacked the capacity for learning and, therefore, were uneducable.[1]

It has been said that there can be no more unique "experiment in nature" than is presented by those born deaf. Here in the midst of our complex culture, they are the living reminders of the state of man in prehistory before language was ever evolved.[2]

The uniqueness of the problems of the deaf require special knowledge on the part of the examiner. As a result of conflicting results by researchers in psychological testing of the deaf, one educator wrote, "They (psychologists) lack the empiric knowledge of the deaf which can be gained only by teaching them and living with them in everyday life. . . . They simply do not get hold of the subject of their examinations . . ."[3]

Although some additional work has been done in developing testing instruments the problem of evaluation described by Aurell apparently still remains.

Dr. Edna Levine, a psychologist for the deaf, has written:

> Psychological examination and counseling of deaf persons are highly individualized undertakings that require a deep understanding of the manifold factors that influence the nature of the human outcome. The twin factors at the root

[1] *Barnett* v. *Barnett*, 54 N.C. 208 (1854). See also K.W. Hodgson, *The Deaf and Their Problems* (1954).

[2] Paget, Sir Richard, "The Origins of Language with Special Reference to the Paleolithic Age," *Journel of World History* (Oct. 1953).

[3] E. Aurell, "A New Era in the History of the Education of the Deaf," *American Annals of the Deaf*, 79 :223-230 (1934).

> of most of these problems—language and communications skills—are also responsible for the major difficulties experienced by psychologists seeking to work with the deaf. Not only must such a worker be familiar with the developmental implications of deafness, he must also possess reasonable familiarity with the range of language expression and communications methods used by the deaf in order to make psychologically rewarding contact in his deaf subjects. Because of these unusual requirements, psychological practice and research in the field have suffered severe limitations.[4]

The deaf are a heterogeneous group which makes each psychological testing situation subject to many variables which must be understood if the person's present abilities, potentials and problems are to be understood.[5]

The absence of special knowledge of the deaf can lead to questionable testing results. Tests given to hearing impaired children by psychologists not experienced with such youngsters are more often in error than when the service is rendered by one familiar with hearing impaired children.[6]

The element of rapport is important in all testing situations but it appears to be of crucial importance with the deaf.

Dr. Levine in *The Psychology of Deafness (supra)*, emphasizes the necessity of establishing rapport before the deaf:

> Special precautions should be taken to make certain that good rapport prevails between the examiner and the deaf client. The use of the manual alphabet and sign language is encouraged as a means of giving test instructions. Otherwise, a natural, somewhat restrained form of pantomine is desirable. The counselors have a special responsibility to prepare the client for the testing experience. If

[4] E.S. Levine, *The Psychology of Deafness*, at 50 (1960).

[5] E. S. Levine, *Youth in a Soundless World*, at 51-52 (1956).

[6] Vernon, "Psychologic Evaluation of Hearing-Impaired Children", in *Communication Assessment and Intervention Strategies*, at 206 (L.Lloyd ed. 1976).

> the psychologist does not know the manual alphabet or sign language, the client should be told beforehand by the counselor about the nature of the tests, the need for full cooperation, the need to make certain that the client fully understands instructions before each test, and that the test results will be discussed later with the counselor. Lack of rapport definitely influences the test results. Moreover, the psychologist has more difficulty in evaluating the effects of poor rapport in the deaf because of difficulties in free and uninhibited communication.

In order to meet the criteria of mental retardation established under the Mental Health Code the factors of reliable and valid testing, labeling and classification become of critical importance.

The problems inherent in a definition of mental retardation is that it implies that it refers to a homogeneous group. The traditional classification of mental retardation by standardized intelligence tests established five groups: profound (I.Q. scores between 0-24), severe (25-39), moderate (40-54), mild (55-69) and borderline (70-84). The classification of borderline has been dropped from the revised classification levels established by the American Association on Mental Deficiency.[7] Because of the detrimental consequences resulting from the labeling of mental retardation the borderline grouping is now considered as borderline normal. Grossman warns:

> It is emphasized that despite current practice a finding of low I.Q. is never by itself sufficient to make the diagnosis of mental retardation. . . .
>
> . . . Only those individuals who demonstrate deficits in both measured intelligence and adaptive behavior are classified as being mentally retarded.[8]

Much of the literature and court decisions dealing with labeling and classification relate to children who were

[7] H. Grossman, *Manual on Terminology and Classification in Mental Retardation* (1973).

[8] Grossman, *supra* at 11, 13.

> found to have been unconstitutionally classified as to intellectual capacity by school psychologists on the basis of standardized tests which were held to be discriminatory.[9]

Mercer, "The Labelling Process", October 16, 1971 (paper delivered at Kennedy International Symposium on Human Rights, Retardation and Research; Panel on the Use and Misuse of Labelling Human Beings: The Ethics of Testing, Tracking and Filing). See also Mercer, *Institutionalized Anglocentrisms Labelling Mental Retardates in the Public Schools, in Race, Change and Urban Society* 311 (P. Orleans & W. Ellis eds. 1971).

As Judge J. Skelly Wright ruled, in *Hobson* v. *Hansen, supra*, the track systems in effect in the District of Columbia schools were unconstitutionally discriminatory because the track system was based upon standardized tests which produce inaccurate and misleading test scores and led children to be wrongfully undereducated and thus unlawfully segregated.

Although "mere classification does not of itself deprive a group of equal protection,"[10] the court must scrutinize the basis for the classification to see if it is constitutionally permissible in the light of a compelling state interest. The classification process used by expert witnesses becomes of awesome importance because its validity or lack of validity can have a significant effect on the court's decision and the liberty of the individual. Due process and equal protection of the laws does not begin in the courtroom; it is applicable in every setting which may impinge on a person's rights.

Drs. Hartman and Garvin are well-trained and experienced persons in the field of psychology. Dr. Reifman is

[9] *Hobson* v. *Hansen*, 269 F.Supp. 401 (1967) *Larry P.* v. *Riles*, 343 F.Supp. 1306 (1972), aff'd, 502 F. 2d 963 (1974); *Diana* v. *California State Bd. of Educ.*, Civil No. C-70-37 RFP (N.D.Cal., Feb. 5, 1970).

[10] *Carrington* v. *Rash*, 380 U.S. 89, 92 (1965).

well-trained and experienced in the field of psychiatry. The court takes into consideration the many years it has had personal knowledge of the competence and contribution these professional persons have made to the Circuit Court of Cook County. The testimony of all three of these experts was to the effect that, although they were experts in their respective fields, they had extremely minimal experience with deaf persons who had no formal manner of communication.

As the court said in *Sansone, supra,* "the facts upon which a medical opinion is based must be established by clear and convincing evidence. . ." The lack of specific experience and knowledge in the psychology of the deaf effects the weight to be given to the testing results and their validity. The testing sessions were filled with anger and resistance by Lang and the examiners did not have sufficient time to establish the needed rapport.

A distinction must be made between "testing" and "assessment". Testing is a relatively narrow and specific method for generating information. Assessment implies the collection of relevant data from all kinds of sources. Because of the limited time the State's experts had with Lang their evaluation was fundamentally a testing of Lang. The testing of Lang by Drs. Hartman, Garvin and Reifman with the inherent limitations in the testing procedures led to predictable consequences—the diagnosis of mental retardation. However, neither the facts upon which the expert opinions were based, nor the opinions themselves are clear and convincing.

From the testimony of the witnesses and from a review of the literature it appears that the fundamental problem in testing deaf adults is that there are no mental or personality tests devised ". . . for their distinctive psychological environments or standardized on their unique life experiences. In effect, this is an 'unstandardized' population for which examiners are ob-

liged to use hearing-standardized tests in the absence of more appropriate instruments."[11]

Because of the complex nature of the problems of the deaf the court recognizes it is extremely difficult to evaluate the capabilities of the deaf. The burden of proof remains, however, upon the State to establish by clear and convincing evidence that Lang is mentally retarded. The court must insist on a high standard from persons who have been given the status of expert witnesses under the Mental Health Code. To do otherwise would condemn the illiterate deaf to the ostracism and myths of inferiority of the Middle Ages. No person should be deprived of due process and the equal protection of the laws because of the lack of adequate psychological tests, or the unavailability of persons competent to examine the deaf or to evaluate the total person.

There was little evidence adduced by the State that Lang was "a person in need of mental treatment," as the Mental Health Code defines it. The testimony of Dr. Reifman on this issue was purely speculative and does not meet the law's requirement that it be based upon clear and convincing evidence. There is a consistency, however, running through the testimony of the State's expert witnesses and many of the Respondent's witnesses that Lang's tolerance of frustrating situations is low; and under such circumstances he becomes irritable, angry and at times explosive. The testimony is ambiguous, however, as to whether this behavior is pathological or not.

The witnesses for Lang, as a group, were able to observe Lang over a seven-month period and thus were able to give an

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[11] Levine, "Psychological Evaluation of the Deaf Client" in *Handbook of Measurement and Evaluation in Rehabilitation* at 278 (B. Bolton ed. 1976).

See also Anderson and Smith "Personality Characteristics of the Disadvantaged" in *Rehabilitation and the Culturally Disadvantaged* at p. 27 (J.T. Kunce and C.S. Cope eds. 1969).

assessment of him from a multi-facet perspective rather than from the single dimension of testing.

The problems of testing a person such as Lang requires extraordinary skills and the court recognizes the importance which clinical judgment must play in the assessment of the severely sensory disabled person. It has been said that "Instead of using tests as measures, he (the psychologist) uses them as clinical probes; and instead of rigid adherence to scores and norms, test response is flexibly interpreted in the context of the developmental and environmental restrictions imposed by a particular disability. . . ."[12]

The psychological tests performed that were able to be used are important as a part of the overall assessment of Lang. Testimony of Drs. Hartman and Garvin set Lang's I.Q. at 50 while Drs. Page-El and Donoghue set Lang's I.Q. within normal range. There is more of a likelihood that a low I.Q. is inaccurate than that a high one is invalid.[13]

In weighing the conflicting testimony regarding Lang's performance on psychological tests the Court gives greater weight to the test results of Dr. Page-El and Dr. Donoghue.

The statutory definition of mental retardation which the Court must apply does not speak of I.Q. To merely rely upon an I.Q. test would be constitutionally impermissible. The court must have a dynamic picture of the cognitive functioning of the person.

The adaptive behavior of Lang is of great importance in supporting the finding that he is not mentally retarded. Adaptive behavior is defined by Grossman in *Manual on Terminology and Classification in Mental Retardation*, as, "the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group."

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[12] Letvine, *Id.* at 86.

[13] Lloyd, *supra* at 206.

The witnesses for Lang give a comprehensive picture of Lang in a living situation, at work, at play, in a language learning situation, being tested and interacting with many different people. The conclusion that must be drawn from his adaptive behavior is that Lang is not mentally retarded but he has clearly manifested dangerous behavior.

Because the testimony of the State's witnesses failed to provide clear and convincing evidence to support a finding that Lang is suffering from a mental disorder or that he is mentally retarded, the court has before it insufficient evidence to so find and have him hospitalized under the Mental Health Code.

This case demonstrates the consequences of a finding of unfitness and its impact both on the rights of the accused and the frequently realistic fears and concerns of society. It is "fundamental to an adversary system of justice"[14] that an individual whose "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial,[15] and convicted.[16]

In order to resolve this dilemma of a person not being able to be tried while they are unfit, all states provide for a procedure which authorizes the court to order treatment of the defendant, either in an institution or in the community, that will enable the defendant to become fit to stand trial.

The posture of this case emphasizes serious gaps in the present Illinois law.

Article 2 of Subchapter V (Sentencing) of the Unified Code of Corrections is entitled "Diversion for Specialized Treatment".

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[14] *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975).

[15] *Id.* at 171.

[16] *People* v. *Lang*, 26 Ill. App. 3d 648, 325 N.E.2d 305 (1975). See also 4 Blackstone's Commentaries 24 (9th Ed. 1783); *Pate* v. *Robinson*, 383 U.S. 375 (1966).

Under this Article section 5-2-1 defines fitness for trial or sentencing as follows:

> (a) For the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable:
>
> (1) to understand the nature and purpose of the proceedings against him; or
>
> (2) to assist in his defense.

Once a defendant, such as Lang, is found unfit to stand trial, there is a diversion of the defendant to decide what specialized treatment is necessary to render him fit.

Section 5-2-2(a) provides as follows for the procedure to be followed after a finding of unfitness:

> (a) If the defendant is found unfit to stand trial or be sentenced, the court shall remand the defendant to a hospital, as defined by the Mental Health Code of 1967, and shall order that a hearing be conducted in accordance with the procedures, and within the time periods, specified in such Act. The disposition of defendant pursuant to such hearing, and the admission, detention, care, treatment and discharge of any such defendant found to be in need of mental treatment, shall be determined in accordance with such Act. If the defendant is not ordered hospitalized in such hearing, the Department of Mental Health shall petition the trial court to release the defendant on bail or recognizance, under such conditions as the court finds appropriate, which may include, but need not be limited to requiring the defendant to submit to or to secure treatment for his mental condition.

Although Section 5-2-1 speaks of unfitness because of a *mental* or *physical* condition the diversion procedure prescribed in 5-2-1 is governed by the Mental Health Code. Section 1-11 of the Mental Health Code, which was earlier set forth in this opinion, provides the criteria for determining if a person is a "Person in Need of Mental Treatment;" and Section 1-12 provides the criteria for determining if a person is mentally retarded.

The perplexing problem develops in administering the law in that there are occasions where a person meets the criteria of being unfit to stand trial but at the same time does not meet the civil commitment standard of "a person in need of mental treatment" or of a mentally retarded person who should be committed for treatment or habilitation. In Lang's case we have a person who is unfit to stand trial because of a combined physical and mental condition; but who does not have a clearly diagnosed mental disorder and who is not mentally retarded, although he has demonstrated violent behavior in the past. Present Illinois law does not permit commitment of a person unfit in the statutory sense who has demonstrated violent behavior in the past but who is not mentally retarded or suffering from a mental disorder.

People ex rel. Myers v. *Briggs*, 46 Ill.2d 281 (1970) involved Lang when he had been charged with another crime. The institution for mentally retarded persons where Lang had been confined after commitment as being incompetent to stand trial had determined that Lang would never acquire the necessary communication skills needed to participate and cooperate in his trial even though he was found to be functioning at a nearly normal level of performance in areas other than communication. Currently, it appears that Lang can learn to communicate if given the proper training program and if he lives in the appropriate setting.

The testimony in this case by expert witnesses and others indicates that Lang is capable of learning to communicate by sign language in from three to five years if his present training and his motivation continues as presently demonstrated. It was also recommended that he should live in a specialized environment and receive vocational training. I interpret the recommended environment to mean an environment in which control is maintained over his activities. Since Lang is neither mentally ill or mentally retarded the Court cannot commit Lang under the Mental Health Code to an environment where he can also

receive the necessary training and education to make him fit to stand trial.

Whether Lang will be able to maintain his apparent motivation to learn cannot be predicted with any high degree of accuracy. However, for the first time in the approximately ten years that he has been involved in various aspects of the criminal justice system, the possibility of meaningful training and progress seems to be present. It is important to recognize that this learning took place during confinement. Judicial requirement that a person undergo treatment under coercive conditions may be necessary as stated by a prominent psychiatrist experienced in the legal process:

> Most persons whom society involuntarily commits are consciously and unconsciously so convinced that no one cares, indeed they look at offers of help with such suspicion, that a sustained period of exposure to an unaccustomed world of trust, respect, and care is required in order to attempt to modify these beliefs. It is possible, without precisely knowing when it is and when it is not, to change defiant, ignorant, and fearful attitudes about treatment through patient and persistent efforts in an institutional setting. Behind the conscious refusal of treatment, other unconscious wishes also operate—to be protected, to be cared for, to be sustained, to be helped. What weight should be given to these wishes when they are almost drowned out by words which damn their own self and the world?"[17]

Such an environment for Lang appears to have been the Illinois State Psychiatric Institute.

Section 5-2-2 of the Uniform Code of Corrections directs the Department of Mental Health to petition the court for a bail hearing. Extensive testimony was heard in this case and to avoid the necessity of much reptition of testimony before

[17] J. Katz, "The Right To Treatment—An Enchanting Legal Fiction?" 36 U. Chi. L. Rev. 755 (1969).

another judge the Presiding Judge of the Criminal Division has authorized this court to conduct the bail hearing. Therefore, a formal petition by the Department of Mental Health is unnecessary.

The Illinois Supreme Court recognized the concern of a trial judge to release a defendant in a case in which the defendant had been charged with aggravated battery and attempted murder and who had been found unfit to stand trial and subsequently found not in need of mental treatment. The Supreme Court gave direction to the trial court when it stated that ". . . the statute does provide that the defendant's release be 'under such conditions as the court finds appropriate.' See *People ex rel. Hemingway* v. *Elrod*, 60 Ill.2d 74 (1975)."[18] That applicable statute which is cited on Page twenty (20) of this Opinion goes on to further provide that the conditions ". . . may include, but need not be limited to requiring the defendant to submit to or secure treatment for his mental condition."

In *Hemingway supra* at 79 the Court said, "In our opinion the constitutional right to bail must be qualified by the authority of the courts, as an incident of their power to manage the conduct of proceedings before them. . ."

In all matters involving the setting of bail there are imponderables which a judge cannot always answer. In the situation involving the unfit person there are additional factors that must be scrutinized carefully. In the case of Lang the court must tailor the conditions of bail to fit the interests of Lang and of the public.

In the past ten years Lang as a result of two separate charges has spent over nine years in custody. Most of that time was because he was unfit to stand trial. No program of training to make him fit was successful until the current training at I.S.P.I. Without training Lang will be isolated forever in his

[18] *People ex rel. Martin* v. *Strahorn*, 62 Ill.2d 296 (1975).

non hearing and noncommunicative world. It is to Lang's advantage that he be trained to communicate effectively with other people and be able to help defend himself in the criminal trial. At the same time society has an interest in making Lang fit to stand trial so that the criminal trial can proceed.

In order to achieve an appropriate balance between the rights of Lang and of society the court imposes the following special conditions of bail:

1. Lang must continue in a training program which shall have as its purpose the teaching of communication skills in order to make him fit to stand trial.

2. In the light of the evidence of impulsive and explosive behavior which resulted in violent acts on the part of Lang it is essential that he reside in a setting with sufficient security to insure the continuity of treatment and his appearance in court.

The Court is cognizant of the fact that Lang with his handicap does not have the capacity to independently develop a plan which conforms to the special conditions of bail. The State has a critical interest in this matter and, therefore, the court hereby orders the Department of Mental Health to collaborate with the attorneys for Lang in developing an appropriate training program and an appropriate living arrangement in compliance with the special conditions of bail. It is the desire of the Court that all available resources be utilized to develop a comprehensive training program.

If there is non-compliance with the conditions of bail and it is necessary for the court to order the respondent to be returned to the custody of the sheriff then this court shall retain jurisdiction to order an appropriate training program while Lang remains in custody. The training program is essential because without training any custodial disposition would constitute an indeterminate period of incarceration in violation of the constitutional requirements set forth in *Jackson* v. *Indiana*, 406 U.S. 715 (1972).

The Department of Mental Health in collaboration with the attorneys for the respondent shall submit a proposed plan in writing to the court within thirty (30) days. Upon receipt of the written plan the court shall set a date for a hearing to consider all conditions of bail.

In order that there be not disruption of the current training program it is ordered that the respondent continue to remain on the security unit at the Illinois State Psychiatric Institute pending further order of this court.

This court shall retain jurisdiction to enter any further orders it may deem necessary.

ENTER:

[s] JOSEPH SCHNEIDER, JUDGE
Joseph Schneider, Judge

December 8, 1976

APPENDIX

C. October 3, 1977 Opinion and Order of Circuit Judge Schneider

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS

vs.

DONALD LANG

Opinion

The instant case presents the question of whether a person who is indicted for murder, found unfit to stand trial yet not in need of mental treatment, nor mentally retarded, who has been admitted to, resided in, and who has received training from the Department of Mental Health and Developmental Disabilities for 17 months and who has made progress toward the goal of becoming fit to stand trial, may be discharged by the Department and denied further training consistent with his statutory right to treatment and without violating his due process rights.

The defendant, Donald Lang, was a deaf person, unable to read, write or use sign language in January 1972 when he was tried, convicted and sentenced for the murder of Earline Brown. The conviction was reversed in 1975 by the Illinois Appellate Court because adequate procedures were not available to compensate for the defendant's lack of communication skills. Absent such trial procedures, the Appellate Court concluded, the defendant could not constitutionally be tried and convicted. *People* v. *Lang*, 26 Ill. App.3d 648, 655 (1975).

On March 25, 1976 in a hearing under Section 1005-2-1 of the Unified Code of Corrections the Honorable Louis B. Garippo in the Criminal Division of the Circuit Court of Cook County found Lang unfit to stand trial. Judge Garippo then ordered Lang remanded to the custody of the Department of Mental Health and Developmental Disabilities (hereinafter referred to as the Department). A hearing was ordered to be conducted in accordance with the Mental Health Code. Ill.Rev.Stat. ch.38 § 1005-2-2, ch.91½ § 1-1 *et seq.* On May 17, 1976, a second fitness hearing was held where the Court found that Lang continued to be unfit to stand trial. On June 7, 1976 a motion to dismiss the indictment was denied and bail was set at $50,000. Ten (10) days later bail was revoked and Lang was again remanded to the custody of the Department.

In a hearing before this Court Lang was found not to be a person in need of mental treatment nor mentally retarded, as defined in the Mental Health Code. Ill.Rev.Stat. ch. 91½ § 1-11, 1-12 (1975). This Court then delineated two conditions for bail:

> 1. Lang must continue in a training program which shall have as its purpose the teaching of communication skills in order to make him fit to stand trial.
>
> 2. In the light of the evidence of impulsive and explosive behavior which resulted in violent acts on the part of Lang it is essential that he reside in a setting with sufficient security to insure the continuity of treatment and his appearance in court. Memorandum Opinion of Dec. 8, 1976 at 24.

Recognizing the State of Illinois' critical interest in this matter the Court ordered the Department of Mental Health and Developmental Disabilities to collaborate with the defendant's attorneys in establishing a plan that would incorporate an appropriate training program with a living arrangement that provided adequate security. The Department and defendant's attorneys were ordered to submit a written report detailing the

proposed program that would meet these conditions for bail within thirty (30) days.

In order for Lang's training program to continue without interruption the Department was ordered to hold Lang until a permanent program could be developed. On February 18, 1977, the Department petitioned for Lang's release from the Illinois State Psychiatric Institute on bail or recognizance. This Court ordered the Department to hold him for twenty-eight (28) days to allow his attorneys time to present their permanent program for his training to this Court.

On March 9, 1977 the order requiring the Department to hold Lang was vacated to be consistent with the statute and the Supreme Court's ruling in *People ex rel Martin* v. *Strayhorn*, 62 Ill.2d 296 (1976). Attorneys for Lang, in order to continue his training, pending the development of a permanent program, applied to the Department for voluntary admission to the Illinois State Psychiatric Institute, a Department facility. Lang was accepted by the Department and admitted by the Department as a voluntary patient. He has resided at this facility and participated in the training program since that date.

Since December 1976, when the conditions of bail were set, no viable plan for training and residence has been presented to this Court. Attorneys for Lang have investigated programs in Illinois, Wisconsin, Maryland, the District of Columbia and Indiana. Only one proposal here in Illinois was presented by the Department.

The Department's plan called for Lang to be housed with 25-30 mentally retarded individuals at the Kankakee Developmental Disability Center. Mr. Art Dykstra, the Regional Coordinator of Developmental Disabilities Programs of the Department, testified that this was the best plan that the Department could construct. The Regional Coordinator admitted that he knew that Lang became irritable when housed with mentally retarded individuals. He did not know if there were

any deaf persons at the Kankakee facility, but assumed that in a population of 9,750 mentally retarded individuals there must be someone with a hearing deficit.

Experts called by the defense, Dr. Laslo Stein, Director of the Siegel Institute of Communicative Disorders, Dr. Max Spanjer of the Division of Vocational Rehabilitation, Dr. Robert Donaghue and Ms. Rhoda Mae Haight, Lang's teacher, unanimously agreed that Lang needed a program where the primary thrust is language training and where deaf peers are included. Mr. Dykstra testified that an environment that included persons with similar handicaps was best. However, the testimony showed that at the Kankakee facility the primary emphasis was on vocational training and not on language training reinforced by contact with deaf peers.

Dr. Richard Olson, the speach and hearing specialist at the Kankakee facility, testified on September 12, 1977, when the Department re-presented the Kankakee program. He testified that a woman came in twice a week for four hours each time to teach sign language. Training at Kankakee was directed toward severely retarded individuals and not toward habilitation or rehabilitation of prelingually deaf people. He conceded that if the Director of the Department and other persons concerned with the running of the Kankakee Developmental Center desired to set up a workable program it could conceivably be done but at a significant cost. Dr. Olson concluded that the problems associated with housing Lang with mentally retarded individuals would outweigh the possible educational benefits he might receive at the Kankakee facility. (Transcript of September 12, 1977 at 33)

At the September 12 hearing, Mr. Grischke for the Department, informed the Court that the Department had decided to discharge Lang from the Department facility where he had resided for some 17 months, on Friday, September 16, 1977. If Lang was released it would be to the custody of the Sheriff of

Cook County because of the pending indictment and his inability to meet the conditions of bail.

This Court on the petition of Julius Lang, the conservator of Lang, joined in by the attorneys for Lang, temporarily restrained the Department from discharging Lang. The Court found after hearing the arguments of the petitioners and the Department that irreparable harm would result if Lang were forced to leave the Department facility before an evaluation team from the Crossroads Rehabilitative Institute arrived the following week. Negotiations with Crossroads Rehabilitative Institute had been going on for some time and were known to the Department. On September 23, 1977 the restraining order was continued for an additional ten (10) days.

There is a body of federal statutory and case law which reinforces the duty of the State of Illinois to furnish Lang the training he needs.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706 was designed to eliminate discrimination on the basis of handicap in any program or activity receiving federal financial assistance. The State of Illinois is a recipient of federal funds in many programs including the Department of Mental Health and Developmental Disabilities, the Division of Vocational Rehabilitation and others. A handicapped person for the purposes of that Act is defined as follows:

> . . . any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment. 29 U.S.C. 706 (6).

Indisputably, Lang has such a physical impairment. Any exclusion of Lang from receiving an adequate training program simply because of his handicap is forbidden by this Act. *Sites* v. *McKenzie, et al,* 423 F.Supp. 1190 (D.W.Va. 1976).

On April 28, 1977 regulations for Section 504 were promulgated by the Secretary of the Department of Health, Education and Welfare with an effective date of June 3, 1977. The regulations spell out with great detail the intent to assure adequate services for all handicapped persons. It would appear that the denial of services to Lang would be a violation of this Act and the regulations and could possibly jeopardize the compliance requirements of the Act for the State of Illinois, to receive funds.

In *Pate* v. *Robinson,* 383 U.S. 375 (1966), the United States Supreme Court held it constitutionally impermissible to convict a defendant who was not competent unless there are compensating procedures to overcome his handicap. See *Drope* v. *Missouri,* 420 U.S. 161 (1975). The fitness standard in Illinois requires that the defendant must be able:

> (1) To understand the nature and purpose of the proceedings against him,
>
> (2) To assist in his own defense.
> Ill.Rev.Stat. ch. 38 § 1005-2-1 (1975)

After Lang's conviction was reversed the Honorable Louis Garippo found him unfit under these standards.

The Supreme Court held in *Jackson* v. *Indiana,* 406 U.S. 715 (1972) that it was constitutionally impermissible to indefinitely commit a person solely because of his incapacity to stand trial. The Due Process clause only allowed commitment long enough to determine if there was a substantial probability that the defendant would become fit to stand trial in the foreseeable future. If it is then determined that the defendant will not become fit to stand trial, the State must proceed under its civil commitment procedures. When it is determined that he will be able to stand trial in the foreseeable future, continued detention may only be justified by continued progress towards that goal.

This Court on August 25, 1977 dismissed a Writ of Habeas Corpus brought by Lang citing his continued progress toward the goal of becoming fit. However, a regression in this process or a cessation of his training might well mean that Lang must be released to avoid a violation of his Due Process rights.

The State of Illinois, therefore, has a real and immediate interest in providing a program that will continue Lang's progress and make him fit to stand trial. Complete release of a person charged with murder without trial is not satisfactory in the face of society's right to be free from the threat of serious crime.

The Department of Mental Health and Developmental Disabilities has a statutory charge in this state. The statute provides that the Department shall:

> . . . provide the highest possible quality of humane and rehabilitative care and treatment to all persons admitted or committed or transferred in accordance with law to the Institutions, Divisions, Programs and Services under the jurisdiction of the Department. Ill.Rev.Stat. ch. 91½ § 100-7 (1975). *See Also* Ill.Rev.Stat. ch. 91½ § 1-12 (1975).

In order to implement the statutory charge that, "every patient shall be provided with adequate and humane care and treatment pursuant to an individual treatment plan" Ill.Rev.Stat. ch. 91½ § 12-1 (1975), the Department has established Rule 12.10. That Rule regulating individual treatment plans requires in part the following:

> (1) initial goals for treatment and preliminary anticipated outcomes and alternatives for *aftercare*
>
> (2) a detailed description of the nature of recommended individual counseling, psychotherapy, group therapy, behavior modification, milieu therapy, family therapy, or *any other form of treatment constituting part of the treatment or habilitation program. . . .*

> (3) *a statement of the need for vocational instruction for the person,* and a plan for this instruction when indicated
>
> (4) a description of any *educational instruction* which the person may require
>
> (5) a clear and concise statement of the elements of behavior and/or state of mind which the plan is designed to treat, the intermediate and *long-range treatment or habilitation goals with a projected timetable for their attainment. . .* (emphasis supplied)

These Rules evidence the Department's continuing duty to its patients. The Department does not and cannot limit itself to inpatient treatment. It has a continuing duty to provide a program that includes rehabilitative training, education and aftercare for all persons who are admitted to its facilities. Ill.Rev.Stat. ch. 91½ § 100-7 (1975).

The statute was amended in 1974 to include the care and treatment of developmentally disabled persons. Ill.Rev.Stat. ch. 91½ § 1-2 (1975). Developmental disabilities are defined as:

> . . . Individuals whose disability is attributable to mental retardation, cerebral palsy, epilepsy or other neurological conditions which generally originate before such individuals attain the age of 18 which had continued or can be expected to continue indeterminately and which constitute a substantial handicap to such individuals. Ill.Rev.Stat. ch. 91½ § 603.03 (1975).

Dr. Edward Page-El, a pediatrician neurologist and an employee of the Illinois Institute of Developmental Disabilities, a facility of the Department, testified as an expert witness in the commitment hearing of October 1976. He stated that he had examined Lang at the request of Dr. Jewett Goldsmith, Clinical Director of the Forensic Psychiatry Program at the Illinois State Psychiatric Institute (I.S.P.I.). This was one of about 150 evaluations he did each year for the Department. The witness

testified that he did not believe that Lang was mentally retarded. The Court then asked whether there was recommendation for a program that would help a person like Lang. Dr. Page-El replied:

> Yes, there is a recommendation. The recommendation is that he be placed in a learning situation for intensive signing courses—signing, learning to communicate with his hands and an educational program in conjunction with a work program for adaptive living subsequent.
>
> The fact that I feel that he is not retarded does not disqualify him from receiving assistance from the Department of Mental Health. And he doesn't have developmental disabilities, but he has a neurological impairment that occurred at an early age, and it is suspected to be permanent.
>
> And even the absence right now of retardation, his disability fits into the classification of developmental disability because it requires the same type of treatment modalities.
>
> This is outlined in Public Law—(Transcript, October 27, 1976 at 28)

The Department has recognized its duty to train Lang and since September 1976 has provided training through an arrangement with the Siegel Institute for Communicative Disorders of Michael Reese Hospital. In October 1976, Ms. Rhoda Mae Haight, a registered interpreter for the deaf and a teacher of sign language for over forty (40) years testified concerning Lang's progress with communication skills. She stated that Lang was learning sign language faster than anyone she witnessed in her teaching career. This was especially promising because she was only able to spend 2½ hours per week with Lang. On May 4, 1977 Ms. Haight again testified that Lang had continued to progress.

The experts called by both the defendant and the Department testified that the environment at I.S.P.I. where Lang

resided was not optimal. All agreed that far more time than the 2½ hours a week for formal sign language training was vitally needed. They also agreed that an environment that included deaf persons would aid in Lang's training. (To date the Department has violated its statutory duty and its own rules by failing to develop a comprehensive long term program that would provide a reasonable expectation of making Lang fit to stand trial.)

Section 1005-2-2 of the Unified Code of Corrections provides that if an unfit Defendant is not ordered hospitalized in a civil commitment hearing, *the Department shall petition* the trial Court to release the defendant on bail or recognizance, under such conditions as the Court finds appropriate, which may include, but need not be limited to, requiring the defendant to submit to or secure treatment. (Emphasis supplied)

Ordinarily, in a criminal proceeding the State or the defendant is the moving party. With this statute, however, the legislature gave the Department a unique role; charging it with the duty to petition the Court for the defendant's release on bail or recognizance. A major objective of this section was to avoid equal protection and Due Process violations by automatic commitments to State hospitals of all unfit persons as provided under the prior law. (Ill.Rev.Stat. 1971, ch. 38 § 104-3) The Council of Diagnosis and Evaluation of Criminal Defendants, a statutory commission, drafted this legislation and in the Council Commentary written by Robert Kent Scott the following comment is made:

> . . . By avoiding automatic commitment, the State is saved the unnecessary expense of institutionalization in cases where it is not required . . . . (Ill.Rev.Stat. 1975, ch. 38 par. 1005-2-2)

The trend toward deinstitutionalization which began in the 1960's influenced this legislation. Alternatives to hospitalization were required to be considered by the Court

(Ill.Rev.Stat. 1967 Chap. 91½, par. 9-6). More and more persons were being treated in settings other than state hospitals. Because of the clinical expertise of the Department and the fact that it was the duty of the Department to evaluate the defendant for the commitment hearing, the legislature required the Department to petition for bail or recognizance when hospitalization was not ordered. If the defendant is not ordered hospitalized, it does not mean that the person does not require treatment. The legislative intent in requiring the Department to petition can only be rationally construed to mean that the Department should participate in developing the necessary treatment alternative to hospitalization for the unfit person.[19]

In *People ex rel Martin* v. *Strayhorn*, supra, the Illinois Supreme Court held that when a defendant was found unfit to stand trial and at a subsequent proceeding not in need of mental treatment and when the Department petitioned for the defendant's release on bail or recognizance after creating a viable program of rehabilitative treatment the Circuit Court could not order the Department to hold the defendant until he became fit to stand trial.

The Lang case is clearly distinguishable. Lang and his conservator are not requesting release from the Department but asking that his treatment continue. Lang's attorneys have been working for ten (10) months to create a long term treatment program with little cooperation from the Department. The facts clearly show that he has been admitted to a facility of the Department. Ill.Rev.Stat. ch. 91½ § 100-7 (1975). He has resided there for 17 months. This clearly brings him within the purview of ch. 91½ § 100-7, entitling him as, a matter of law, to the highest possible quality of rehabilitative care and treatment.

[19] This Court served as a member of the Council on the Diagnosis and Evaluation of Criminal Defendants throughout the time the Uniform Code of Corrections was drafted and considered by the General Assembly.

Am. Fed. of State Co. & Munc. Emp. v. *Walker*, 27 Ill. App.3d 883 (1975).

The *Strayhorn* case may also be distinguished in that there was an alternative plan for treatment at a facility operated by the Department which was more suitable for the defendant. Here although the attorneys for Lang have searched at least five (5) states for ten (10) months no suitable program has been found that would accept Lang. In *Strayhorn*, the Department was fulfilling its duty seeing that the defendant was given adequate treatment in a facility better able to treat him. *Here the Department offers no adequate training program at all.*

This Court recognizes that the superintendent in charge of a Department facility has discretion at any time to discharge any person who is found no longer to be in need of hospitalization. Ill.Rev.Stat. ch. 91½ § 10-4 (1975). This discretion must not, however, be inconsistent with the Department's duty to provide the highest quality humane care and treatment. Ill.Rev.Stat. ch. 91½ § 12-1 (1975).

The Circuit Court of Cook County does not have the authority nor the desire to operate a Department facility. *Amer. Fed. of State Co. & Mun. Emp* v. *Walker, supra.* at 827. *When, however, the clear statutory rights of a patient are violated judicial intervention is required. Id.* This court does not mandate where the training must be conducted nor what type of treatment or training must be provided. *See, Wyatt* v. *Stickney* 344 F.Supp. 387 (M.D. Ala. 1972) *c.§. Am. Fed. of St., Co., & Munc. Emp., supra* at 887. *However, this Court does require that the Department fulfill its statutory charge and provide Donald Lang with the highest possible quality of humane care and training.*

This Court hereby orders that a Writ of Mandamus be issued against Dr. Robert DeVito, Director of the Department of Mental Health and Developmental Disabilities, commanding

him to create and implement an adequate and humane care and treatment program for Donald Lang.

Mandamus is an extraordinary remedy. It is a summary and drastic writ and it is sometimes referred to as the highest judicial writ known to the law. The extraordinary Writ of Mandamus must be predicated on a clear right of the petitioner to such relief. *People ex rel Shell Oil Co.* v. *City of Chicago,* 9 Ill. App.3d 242 (1972). Here, the defendant has a clear statutory right to treatment. Ill.Rev.Stat. ch. 91½ § 1-1 *et seq.* (1975). Mandamus will lie even though there may be other remedies available. Ill.Rev.Stat. ch 87 § 9 (1975). The writ only requires the Director to perform in accordance with the law.

In order to assure the Court of compliance with this order and in accordance with the statute and rules of the Department, the Director shall cause to be incorporated into the Department's petition for bail or recognizance and submit to this Court, the training program that conforms to Rule 12.10(2) of the State of Illinois Rules of the Department of Mental Health and Developmental Disabilities.

This Court will not interfere with the Director's discretion as to how such a program will be implemented, but, it must be adequate, humane and reasonably geared toward making Lang fit to stand trial. Mandamus will issue to compel the exercise of a discretionary duty or power, but not the way in which the officer shall exercise his discretion. *Gustafson* v. *Wethersfield Tp. High School Dist. 191,* 319 Ill. App. 255 (1943).

This Writ of Mandamus will, however, compel the Director to have the Department implement a reasonably effective program. Mandamus will lie to prevent discretionary power from being exercised with manifest injustice. *People ex rel Shell Oil Co.* v. *City of Chicago, supra.* at 245. *See also Jackson* v. *Indiana, supra. People ex rel Meyers* v. *Briggs,* 46 Ill. 2d 201 (1970).

In summation the Court must make certain observations consistent with this opinion. *The people of the State of Illinois have a right to expect an agency of its government, the Department which has a budget of over four hundred million dollars to do its job.* The State has many other agencies and resources at its disposal that the Department can utilize; as an example, the Division of Vocational Rehabilitation has appeared ready to assist in attempting to develop a sound training program. The training program presently being tried is extremely limited. Whether Lang can be trained to communicate even with a truly adequate program is unanswerable at this time. *We can predict, however, that with no program or a poor program he will never be competent to stand trial.*

Every effort must be made to make Lang fit to stand trial because Lang should be tried on the criminal charge. This Court stated in its opinion of December 8, 1976:

> It is to Lang's advantage that he be trained to communicate effectively with other people and be able to help defend himself in the criminal trial. At the same time society has an interest in making Lang fit to stand trial so that the criminal trial can proceed.

The warning that this Court must make is that the failure of the State to train Lang not only violates Lang's rights but it will not protect society. The law will not require a man to live in this *limbo* indefinitely. *Jackson* v. *Indiana, supra.* The Director must tailor a program that conforms with the special conditions of bail that are necessary.

The Illinois Supreme Court recently stated:

> A high value has also been placed, . . ., on our society's obligation to protect and care for those of its members unable to protect or care for themselves.
>
> It is important to a concerned and humane society that the margin of error be held to a minimum in denying such protection and care. Moreover, the individual involved, as

> well as society, has a strong interest in getting needed care or treatment which will enable him to function normally, and it seems to us that neither the interests of society nor the mentally ill are well served by a standard requiring proof so conclusive that many persons will be denied needed treatment, care and protection.
> *In Stephenson*, S. Ct. Doc. 48390 (September 20, 1977)

The above quotation from the opinion written by Justice Robert C. Underwood articulates the need to respond to the needs of both society and the individual in the complex and perhaps unique case of Donald Lang.

The Court finds that the conservator of Donald Lang has a real interest in these proceedings and denies the motion by the Department to strike his pleadings.

This Court, therefore, orders:

1. The temporary restraining order dissolved.

2. Dr. Robert DeVito, Director of the Department of Mental Health and Developmental Disabilities, to direct that an adequate training program be developed and implemented forthwith as described in this opinion.

3. The Department to file an amended petition for Lang's release on bail or recognizance by October 19, 1977. The petition shall set forth the details of the proposed program and shall conform with the special conditions of bail set forth in this Court's order of December 8, 1976. A hearing on the petition shall be held in this Court on October 24, 1977, at 10:30 a.m.

4. Department's motion to strike the conservator's pleadings is denied.

5. The conservator's petition for an injunction is denied in the light of the relief granted in this order.

6. Leave is granted for the conservator and the defendant, Lang, to amend their pleadings within fifteen (15) days in accordance with the Court's findings.

ENTER:

_____

JOSEPH SCHNEIDER, *JUDGE*

October 3, 1977

PEOPLE of the State of Illinois,

Plaintiff,

v.

Donald LANG,

Defendant,

Robert A. deVito, M.D., Director Illinois Department of Mental Health and Developmental Disabilities,

Respondent-Appellant.

Nos. 77-1541, 78-250.

Appellate Court of Illinois,
First District, Second Division.

June 20, 1978.

Rehearing Denied Aug. 1, 1978.

DOWNING, Justice.

This is yet another case affecting the deaf-mute, Donald Lang (defendant), who until quite recently was never trained to communicate in any recognized language system. (See *People* v. *Lang* (1967), 37 Ill.2d 75, 224 N.E.2d 838; *People ex rel. Myers* v. *Briggs* (1970), 46 Ill.2d 281, 263 N.E.2d 109; *People* v. *Lang* (1st Dist. 1975), 26 Ill.App.3d 648, 325 N.E.2d 305, *cert. denied,* 423 U.S. 1079, 96 S.Ct. 851, 47 L.Ed.2d 80.) In appeal no. 77-1541, Robert A. deVito, M.D., Director of the Illinois Department of Mental Health and Developmental Disabilities (Director), appeals from the circuit court's issuance of a writ of mandamus against him. In appeal no. 78-250, defendant's attorneys (Public Defender) appeal from an order denying a petition for a writ of habeas corpus. We consolidated the cases on appeal in order to expedite a final disposition of the extensive litigation.

On July 26, 1971, defendant was indicted for murder (Ill.Rev.Stat. 1969, ch. 38, par. 9-1); and in January of 1972, he was convicted of that crime and sentenced to 14 to 25 years imprisonment. On February 14, 1975, we reversed the judgment because defendant's conviction was secured in the absence of trial procedures effectively compensating for defendant's disabilities. (26 Ill.App.3d 648, 655, 325 N.E.2d 305.) We remanded the cause with directions that defendant's fitness to stand trial be determined pursuant to section 5-2-1 of the Unified Code of Corrections (hereinafter UCC) (Ill.Rev.Stat. 1975, ch. 38, par. 1005-2-1[20] On March 25, 1975, defendant was found unfit to stand trial and was remanded to the Illinois Department of Mental Health and Developmental Disabilities (Department) for a hearing into his need for hospitalization. (Ill.Rev.Stat. 1975, ch. 38, par. 1005-2-2.)[2] Thereafter, on

[20] Section 5-2-1 of the Unified Code of Corrections (Ill. Rev. Stat. 1975, ch. 38, par. 1005-2-1(a)) provides:

"(a) For the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable:

(1) to understand the nature and purpose of the proceedings against him; or

(2) to assist in his defense."

[21] Section 5-2-2(a), (b) of the Unified Code of Corrections (Ill.Rev.Stat. 1975, ch. 38, par. 1005-2-2(a), (b)) provides:

"(a) If the defendant is found unfit to stand trial or be sentenced, the court shall remand the defendant to a hospital, as defined by the Mental Health Code of 1967, and shall order that a hearing be conducted in accordance with the procedures, and within the time periods, specified in such Act. The disposition of defendant pursuant to such hearing, and the admission, detention, care, treatment and discharge of any such defendant found to be in need of mental treatment, shall be determined in accordance with such Act. If the defendant is not ordered hospitalized in such hearing, the Department of Mental Health and Developmental Disabilities shall petition the trial court to release the defendant on bail or recognizance, under such conditions as the court finds appropriate, which may include, but need not be limited to requiring the defendant to submit to or to secure treatment for his mental condition.

December 8, 1976, defendant was found not in need of mental treatment and not mentally retarded, as those terms are defined in the Mental Health Code (hereinafter MHC). Ill.Rev.Stat. 1975, ch. 91½, pars. 1-11, 1-12.

In addition to finding defendant not in need of hospitalization, the court also imposed certain special conditions on bail: (1) that defendant continue in the Department's training program designed to teach him communication skills with the goal of rendering him fit to stand trial; and (2) that defendant reside in a secure setting to insure the continuity of his training and his appearance in court. The court concluded that the state had a critical interest in defendant's training and, therefore, ordered the Department to collaborate with the Public Defender in developing both an appropriate training program and an appropriate living arrangement. Pending further order of court, defendant was directed to continue his residence at the security unit at the Illinois State Psychiatric Institute (ISPI), a Department facility.

On February 18, 1977, the Department petitioned for defendant's release from ISPI on bail or recognizance. A month later the court's order requiring the Department to hold defendant was vacated and the Public Defender applied to the Department for defendant's voluntary admission. Defendant was then accepted in that status at ISPI where his temporary training in sign language continued. Between December of 1976 and October of 1977, the court conducted an extensive

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(b) A defendant hospitalized under this Section shall be returned to the court not more than 90 days after the court's original finding of unfitness, and each 12 months thereafter. At such re-examination the court may proceed, find, and order as in the first instance under paragraph (a) of this Section. If the court finds that defendant continues to be unfit to stand trial or be sentenced but that he no longer requires hospitalization, the defendant shall be released under paragraph (a) of this Section on bail or recognizance. Either the State or the defendant may at any time petition the court for review of the defendant's fitness."

bail hearing in order to ascertain the necessary conditions of bail. In the course of such hearing, the parties were investigating various programs across the nation which would accept defendant in a permanent training program. Defendant's brother, Julius Lang (Conservator), also became involved in the bail hearing: initially as the conservator of defendant's estate and later as the conservator of defendant's estate and person.

In September of 1977, the Department informed the court that it had decided to discharge defendant and release him to the custody of the Sheriff of Cook County. The Conservator and the Public Defender then obtained a temporary restraining order preventing such discharge. On October 3, 1977, the court issued an oral opinion dissolving the temporary restraining order. The next day the Department released defendant to the Sheriff's custody and defendant was taken to the jail where he still remains. By the October 3 order (reduced to writing on October 11, 1977), the court issued a writ of mandamus against the Director, commanding him to "create and implement an adequate and humane care and treatment program for Donald Lang." The Director now appeals from the order and from an order which denied his motion to vacate, alter or amend the prior order. We granted the Director's motion for a stay of the order requiring him to develop a program.

While the Director was perfecting the appeal in 77-1541, the proceedings below continued. On October 19, 1977, the Public Defender filed a motion to quash the warrant and bar further prosecution, a petition for writ of habeas corpus, and a motion to modify the conditions of bail. On October 24, 1977, the court set defendant's bail in the amount of $50,000, which could be executed by the Conservator. The conditions of bail set forth in the orders of December 8, 1976 and October 11, 1977, were to be superseded by the condition that within 30 days of his release on bail defendant was to be placed in a training program designed to help render him fit to stand trial.

Lastly, the court entered an order, later stayed, for a rule to show cause why the Director should not be held in contempt for his failure to obey the earlier order commanding him to create and implement a training program.

On November 29, 1977, the trial court denied the motions and petitions filed by the Public Defender. The court acknowledged that since the time of its denial of an earlier petition for a writ of habeas corpus, defendant had been transferred to the jail where all training had ceased. As bail had been set in an amount which the Conservator could provide, the court maintained that the only restraint upon defendant was the Conservator's "unwillingness to post bail without a suitable living arrangement." On defendant's behalf, the Public Defender now appeals in 78-250 from the court's denial of the petition for a writ of habeas corpus.

The issues presented by these appeals may be reduced to the following: (1) whether the court conducted the bail hearing properly; (2) whether the court had the authority to order the Department to retain custody of defendant; (3) whether the court had the authority to order the Director to develop and implement a training program for defendant; (4) whether the court had the authority and jurisdiction to enter a writ of mandamus against the Director and, if the court was so authorized, whether the entry of the writ was permissible upon the facts; (5) whether the court erred in denying the petition for a writ of habeas corpus; and (6) whether the court erred in refusing to dismiss the indictment against defendant.

I.

We note at the outset that the Director has challenged the method by which he was brought into the mandamus action. He contends that the court never acquired jurisdiction over him because the petition for mandatory injunction was filed by the

Conservator who was not a proper party to the proceedings, and, because the petition was filed against the Governor of Illinois and the State's Attorney of Cook County, but not the Director himself. A limited chronological review of the case below is necessary to understand the court's issuance of the mandamus.

From December of 1976 to October of 1977, the court held a lengthy hearing with the object of setting the terms and conditions of defendant's release on bail. The determination of such special conditions was complicated by the unique nature of defendant's disabilities, his history of alleged violence, the conflict in the expert testimony proffered and the inability to locate a program which provided the necessary training and suitable security. Although the Department had accepted defendant as a voluntary admission to ISPI, the Department made clear that it did not believe defendant belonged in that facility. The Department's single suggestion was defendant's placement in a facility which housed mentally retarded individuals. That suggestion ignored the finding that defendant is not mentally retarded and that he becomes irritable when housed with those who are. Simultaneously, the Public Defender was investigating programs in Illinois, Wisconsin, Maryland, the District of Columbia, and Indiana, which would offer defendant both the specialized training he needs and a therapeutic living environment.

In the course of the bail hearing, on February 18, 1977, the Public Defender suggested that in order to further investigate a program with the Illinois Division of Vocational Rehabilitation, it would be advisable to have representatives of the Social Security Administration, the Department of Public Aid, and the Conservator appear in court. The Conservator was subpoenaed, and on May 4, 1977, the court called him as the court's witness. The Conservator explained that he was at that time conservator of defendant's estate and would be willing to become conservator of defendant's person. The Conservator

said that he had always assumed that he had authority of defendant's person also. On June 8, 1977, an attorney appeared for the first time in the proceedings as the Conservator's counsel. On July 12, 1977, the attorney appeared and tendered an order stating that the Conservator had been appointed conservator of defendant's person. The Conservator also testified on that date that he was prepared to take defendant home even though no one from the Department had ever talked to him about the possibility during the three or four year period when he had been conservator of defendant's estate.

Commencing from that point in the proceedings, the Conservator's attorney represented the Conservator and filed motions. On September 22, 1977, the Department moved to strike all of the Conservator's pleadings up to that point "which in any way concern the bail or recognizance hearing." In particular, the Department wanted the Conservator's amended petition for a preliminary injunction stricken. The Conservator and the Public Defender had petitioned for and obtained an order temporarily restraining the Department from discharging defendant to the Sheriff of Cook County. The court found that irreparable harm would result if defendant were forced to leave ISPI before an evaluation team arrived from an Indiana institute. On September 23, 1977, the temporary restraining order was continued in effect pending the resolution of various motions and petitions before the court. They included the Conservator's petition for mandatory injunction and the Governor's special and limited appearance and motion to strike and dismiss the petition. The trial court did not rule upon the latter. On October 11, 1977, the court dissolved the temporary restraining order, denied the Department's motion to strike the Conservator's pleadings, and issued the writ of mandamus against the Director of the Department.

[1] In view of this sequence of events, we cannot say that the trial court lacked jurisdiction to enter a writ of mandamus. We think the Conservator was a proper party to the proceed-

ings. Although the Director argues that the court erred in deviating from the strict format of the bail hearing being conducted, we disagree. In our opinion the state and defendant were not the only real participants in this bail hearing. We are not persuaded by the Director's bald assertion that section 5-2-2 of the UCC bars the admission of other parties. The record clearly reflects that the trial court was aware of the unusual hearing being conducted and the necessity of having all affected persons before it. The conduct of the proceedings was in accord with section 25 of the Civil Practice Act, which provides in part, "[i]f a complete determination of a controversy cannot be had without the presence of other parties, the court may direct them to be brought in." (Ill.Rev.Stat.1975, ch. 110, par. 25(1).) Here the Conservator had control over defendant's estate and later his person. Defendant's placement in some of the suggested programs could have required the Conservator's authorization for the disbursement of funds or the Conservator's assessment of defendant's finances. Furthermore, the eventual setting of bond in the amount of $50,000 demonstrates the need for the Conservator's presence in order to meet the stated sum. We conclude, therefore, that the Conservator's presence was needed for a complete determination of the hearing, and that the trial court committed no error in admitting him to the proceedings.

[2-4] The Director's contention that the trial court lacked jurisdiction because the Director was not properly before the court is also without merit. Pursuant to section 11 of "An Act to revise the law in relation to mandamus," the provisions of the Civil Practice Act apply to mandamus proceedings. (Ill.Rev.Stat.1975, ch. 87, par. 11; see also *People ex rel. Commissioners* v. *Dixon* (1931), 346 Ill. 454, 460, 178 N.E. 914.) Generally, anyone interested in the subject matter of a mandamus action may be brought in as a party or may intervene. (26 I.L.P. *Mandamus*, § 127, citing section 25 of the Civil Practice Act, Ill.Rev.Stat.1975, ch. 110, par. 25.) All

persons should be made parties who are legally or beneficially interested in the subject matter of the litigation, and who will be affected by the decree, so as to enable the court to dispose of the whole controversy. (*Oglesby* v. *Springfield Marine Bank* (1944), 385 Ill. 414, 423, 52 N.E.2d 1000; *Riley* v. *Webb* (1916), 272 Ill. 537, 538-539, 112 N.E. 340; *Nolan* v. *Barnes* (1915), 268 Ill. 515, 523, 109 N.E. 316.) In a proceeding for mandamus, when a party is shown by the petition to have a legal interest in the right or duty sought to be enforced by the writ, and that the rights of such party will be collaterally determined by the judgment if rendered as prayed in the petition, the cause should not be adjudicated until such party is made a respondent thereto, when he is shown to be within the jurisdiction of the court. *Powell* v. *People ex rel. Hedrick* (1905), 214 Ill. 475, 479, 73 N.E. 795; *People ex rel. Bradford National Bank* v. *School Directors* (4th Dist. 1941), 309 Ill.App. 242, 249-250, 32 N.E.2d 1008.

Although the Conservator's petition for mandatory injunction named the People of the State of Illinois, the Governor and the State's Attorney as respondents, part of the relief sought was a mandatory injunction requiring the People as represented by the State's Attorney and Governor to "develop a program (within the guidelines to be set for his release on bail or recognizance) for Donald Lang which holds out a substantial likelihood that he will be given the opportunity to acquire fitness to stand trial within a reasonable time." Any such relief had to be provided by the Department and its Director as representatives of the executive branch of the state government under the Governor. We interpret the court's action in this respect as one whereby he joined the Director and then issued the relief requested against the respondent most able to provide it.

[5, 6] Regardless of what his position in the proceedings is denominated, the Director should have a critical interest in the ultimate disposition of the defendant, Donald Lang. A complete determination of the petition for mandatory injunction could not be had without his presence. (Ill.Rev.Stat. 1975, ch. 110, par. 25.) Therefore, the Director was a "necessary respondent" (*Powell*, 214 Ill. at 479, 73 N.E. 795); a "necessary party" (*In re North Country Development Corp.* v. *Massena Housing Authority* (1970), 65 Misc.2d 105, 316 N.Y.S.2d 894, 897); the "real party in interest" (*Martin* v. *County of Contra Costa* (1970), 8 Cal.App.3d 856, 87 Cal.Rptr. 886, 892); an "indispensable party" (*State ex rel. State Highway Commission* v. *Quesenberry* (1964), 74 N.M. 30, 390 P.2d 273, 275); and the person who has "an interest in the controversy adverse to the plaintiff" (*State ex rel. Hartoon* v. *Sweeney* (Ohio App.1950), 105 N.E.2d 660, 660). Under the circumstances of this particular case, the court had the statutory authority (section 25 of CPA) to add the Director as a respondent. Moreover, the power to add such parties as may be affected by the result of either an order in the nature of mandamus or a judgment of injunction is inherent. *People ex rel. Public Service Commission* v. *New York Telephone Co.* (1940), 174 Misc. 517, 21 N.Y.S.2d 405, 409; *State ex rel. Kubel* v. *Plummer* (1924), 130 Wash. 135, 226 P. 273, 275.

For all of these reasons we reject the Director's asserted challenge to the court's jurisdiction over him. The entry into the proceedings of both the Conservator and the Director might appear to be unorthodox, however, such was necessary to the facts of this case. The presence of both parties in this continuing litigation is necessary in order to hopefully assist in solving the many issues raised in this matter.

II.

On December 8, 1976, the trial court found defendant neither in need of mental treatment, nor mentally retarded. Nevertheless, the court ordered the Department to retain custody of defendant during the bail proceedings. The Director maintains that the court erred in doing so because it had no authority to order the Department to "hold" an unfit, uncommittable defendant. We agree.

[7] A defendant who is found unfit to stand trial is remanded to a hospital for a hearing to determine if he is in need of mental treatment. (Ill.Rev.Stat.1975, ch. 38, par. 1005-2-2(a).) The hearing into an unfit defendant's need for mental treatment is conducted in accordance with the terms and procedures of the MHC. (Ill.Rev.Stat.1975, ch. 38, par. 1005-2-2(a); *People* v. *Byrnes* (2nd Dist. 1972), 7 Ill. App.3d 735, 738, 288 N.E.2d 690.) The MHC contains two criteria for a defendant's need of hospitalization: that he is a person in need of mental treatment, or that he is mentally retarded. (Ill.Rev.Stat.1975, ch. 91½, pars. 1-11, 1-12; *People* v. *Lang* (1st Dist. 1975), 26 Ill.App.3d 648, 658, 325 N.E.2d 305, *cert. denied* 423 U.S. 1079, 96 S. Ct. 851, 47 L.Ed.2d 80.) If it is determined that the unfit defendant is not in need of hospitalization, then the Department must petition the trial court to release the defendant on bail or recognizance. (Ill.Rev.Stat.1975, ch. 38, par. 1005-2-2(a).) Once the petition is filed, the court must hold a hearing into the question of the defendant's release. *People ex rel. Martin* v. *Strayhorn* (1976), 62 Ill.2d 296, 342 N.E.2d 5.

[8] The Director argues that once the trial court found that defendant was unfit to stand trial and not in need of hospitalization and the Department petitioned for defendant's release, the court had no legitimate statutory or clinical justification to order the Department to retain custody of defendant in Department facilities. Our recent opinion in *People* v. *Ealy* (1st Dist. 1977), 49 Ill.App.3d 922, 7 Ill.Dec. 864, 365 N.E.2d 149 supports the Director's contention. In Ealy the court below set bail for the unfit, uncommittable defendant in an amount which allegedly precluded his release. We held, in part, that the court was not authorized to order the Department to hospitalize the defendant pending his appeal:

> "The Mental Health Code, when read in conjunction with the Unified Code of Corrections, clearly indicates that when a person charged with a felony has been found unfit to stand trial, only if such person is thereafter found to be in need of hospitalization, can he be admitted to a facility of the Department. * * *
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> [T]here is nothing in either the Unified Code of Corrections or the Mental Health Code permitting unfit defendants to be housed in Department facilities when the Department has already determined that no treatment can be offered to an individual found not in need of mental treatment." (49 Ill.App.3d 922, 937-938, 7 Ill. Dec. 864, 875, 365 N.E.2d 149, 160.)

It is obvious the trial court was concerned about the defendant's environment and possible continued training. Nevertheless, we can find no authority for the trial court to order the Department to house defendant pending the outcome of lengthy bail proceedings.

Yet the Conservator contends that the trial court was authorized to so order the Department because the retention of custody was ordered to foster release on bail, not to prevent it. Since our supreme court held in *People ex rel. Martin* v. *Strayhorn* that section 5-2-2(a) of the UCC dictates the release of the unfit, uncommittable defendant on bail or recognizance, we have consistently held that the trial court must conduct a hearing and determine the defendant's release on bail or recognizance. (*E.g., Ealy; People* v. *Williams* (1st Dist. 1977), 48 Ill.App.3d 842, 6 Ill.Dec. 386, 362 N.E.2d 1306; *People* v. *Theim* (1st Dist. 1977), 52 Ill.App.3d 160, 9 Ill.Dec. 933, 367 N.E.2d 367; *People* v. *Patterson* (1st Dist. 1977), 54 Ill.App.3d 931, 12 Ill.Dec. 908, 370 N.E.2d 819.) The Conservator maintains that *Martin* and its progeny are distinguishable because here the trial court did not order the Department to hold defendant in lieu of setting bail. Instead, the court conducted a complex bail hearing, during the course of which defendant remained at ISPI. We think, however, that the court could no more order the Department to retain custody of defendant during the bail hearing than the court in *Ealy* could order the Department to hold the defendant pending his

appeal. In both cases the Department was ordered to do what it believed was beyond the court's authority to order. In both cases the Department was ordered to house a defendant whom the Department believed more properly belonged in the Cook County Jail. Although the trial court here was not engaged in any hidden exercise in preventive detention and was understandably attempting to strike a balance of interests as required by *People ex. rel. Hemingway* v. *Elrod* (1975), 60 Ill.2d 74, 322 N.E.2d 837, it exceeded its authority. The circuit court is not authorized to establish procedures and guidelines for the Department. *Ealy*, 49 Ill.App.3d at 937, 7 Ill.Dec. 864, 365 N.E.2d 149.

While we deem the trial court's order error, the reason for the order's entry is important. The court had conducted lengthy hearings into the question of whether defendant was in need of mental treatment or mentally retarded. The state presented three expert witnesses: Dr. A. Arthur Hartman, a registered clinical psychologist and Director of the Department of Psychology of the Psychiatric Institute of the Circuit Court of Cook County, Dr. Robert Reifman, Assistant Director of that Institute, and Dr. Joseph Garvin, a registered clinical psychologist. On the basis of psychological tests he attempted to administer on three occasions, Dr. Hartman classified defendant as a mental defective with an estimated age level of about 7, as mentally defective with a permanent severe limitation in communication, and as mentally retarded and functioning at a seven year level, with additional severe limitation in language and symbolic functions or aphasia. On the basis of three examinations, Dr. Reifman diagnosed defendant as mentally retarded with explosiveness and dangerous to others. Dr. Garvin diagnosed defendant as mentally retarded with an I.Q. of 50 to 60 and mental age of 7, with a degree of emotional disturbance, impulsivity and some agitation. The three state experts agreed that defendant was dangerous to others and likely to be dangerous to himself or others in the future as a result of mental retardation.

In order to refute such testimony, the Public Defender called a series of witnesses. Dr. Edward Page-El, a neurologist and pediatrician at the Illinois Institute of Developmental Disabilities, said that defendant's I.Q. was in the 82-100 range. A major portion of Dr. Page-El's work involved the evaluation and diagnosis of mentally retarded persons and persons with other neurological deficits. His testing of defendant was pursuant to the advice and direction of Dr. Donoghue, another defense expert. Dr. Jewett Goldsmith, a board certified psychiatrist and Clinical Director of the Forensic Psychiatry Program at ISPI, observed defendant daily for about seven months. Although he did not think defendant was either mentally retarded or mentally ill, Dr. Goldsmith felt defendant suffered from a mental disorder but not from any type of psychosis or neurosis. He gave no specific diagnosis because he could not determine if defendant's behavior was maladaptive or adaptive behavior due to his handicap.

Defendant was also examined by Dr. Robert J. Donoghue, a school and registered clinical psychologist with a Ph. D. in the psychology of the deaf. Dr. Donoghue had tested between 2,000 and 3,000 deaf persons. In explaining the problems of evaluating test scores of deaf persons, he emphasized the importance of rapport and testing environment. Although he is deaf, Dr. Donoghue said that while one would not have to be deaf to psychologically test a deaf person, it is debatable whether one with a Ph. D. in clinical psychology but little experience with the deaf could be able to evaluate the results. Dr. Donoghue diagnosed defendant as neither mentally retarded, nor mentally ill, but socially and educationally retarded. He believed defendant to be of at least average intelligence and possibly bright normal. Moreover, Dr. Donoghue testified that given time and training in a sheltered environment, defendant could engage in a normal conversation in three to five years.

John Schneir, a certified social worker employed at ISPI, testified as to defendant's prior history and behavior at ISPI.

Based upon the material he compiled and his own observation, Mr. Schneir thought that defendant was not mentally retarded but very self-centered. Joyce Johnson, a registered nurse with a specialty in psychiatric nursing and assistant head nurse of the Forensic Unit at ISPI, testified that defendant was self-sufficient, independent, and cooperative on the ward, but that once he had had to be physically restrained. Susan Matti, a registered occupational therapist employed at ISPI, said that having observed defendant in occupational therapy shop, she thought defendant had a high skill level while working on craft projects and exhibited above average skills for the patient population. John La Bon, a recreational therapist at ISPI, discussed defendant's progress in the occupational therapy shop and told of defendant's attempts at sign language.

The final witness was Rhoda Mae Haight, a registered interpreter of the deaf and author of many articles dealing with sign language. She was defendant's teacher and therapist at the Siegel Institute of Communication Disorders of the Michael Reese Hospital.[22] In the course of teaching defendant sign language, she observed him teaching staff members on the unit signs she had taught defendant. After she taught defendant 30 signs, he learned 20 more on his own from a book she had given him. Ms. Haight testified that defendant learned sign language more rapidly than anyone she had ever taught.

The court thereafter entered its order requiring the Department to collaborate with the Public Defender in developing an appropriate, permanent training program and living arrangement in compliance with the special conditions of bail. The Department was ordered to retain custody of defendant at ISPI so that there would be no disruption of his current training.

[22] Ms. Haight was employed by the Siegel Institute as a recognized expert in the field of teaching sign language. The Department made financial arrangements so that she could teach sign language to defendant at ISPI.

Although that order exceeded the court's authority, a review of the expert testimony demonstrates why the court entered it. In the words of the court by the Honorable Joseph Schneider:

> "Whether Lang will be able to maintain his apparent motivation to learn cannot be predicted with any high degree of accuracy. However, for the first time in the approximately ten years that he has been involved in various aspects of the criminal justice system, the possibility of meaningful training and progress seems to be present. It is important to recognize that this learning took place during confinement. Judicial requirement that a person undergo treatment under coercive conditions may be necessary as stated by a prominent psychiatrist experienced in the legal process:
>
> > Most persons whom society involuntarily commits are consciously or unconsciously so convinced that no one cares, indeed they look at offers of help with such suspicion, that a sustained period of exposure to an unaccustomed world of trust, respect, and care is required in order to attempt to modify these beliefs. It is possible, without precisely knowing when it is and when it is not, to change defiant, ignorant, and fearful attitudes about treatment through patient and persistent efforts in an institutional setting. Behind the conscious refusal of treatment, other unconscious wishes also operate—to be protected, to be cared for, to be sustained, to be helped. What weight should be given to these wishes when they are almost drowned out by words which damn their own self and the world? [J. Katz, 'The Right to Treatment—An Enchanting Legal Fiction?' 36 U.Chi.L.Rev. 755 (1969).]
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> Such an environment for Lang appears to have been the Illinois State Psychiatric Institute."

[9-11] The interplay of the UCC and the MHC makes clear, however, that the Department may not properly be ordered to house unfit defendants who are not in need of

hospitalization. Even under the guise of its equitable powers, the trial court could not order the Department to ignore the statutory mandate. It is not in the power of the trial court to relieve against the force of a statute, the meaning of which is not doubtful. (*Donoghue* v. *City of Chicago* (1870), 57 Ill. 235, 238; *Woman's American Baptist Home Mission Society* v. *Rayburn* (2nd Dist. 1916), 203 Ill. App. 577, 580.) Under the present statutory scheme, the county jail is the only place for an unfit, uncommittable defendant who is awaiting the outcome of his bail hearing. Although the expert testimony in this case showed that defendant required training which the Cook County Jail did not offer, the court was nevertheless bound to transfer defendant from the Department to the jail once it was determined that defendant needed no hospitalization. It is the duty of the trial court to interpret the statute as it is, regardless of the court's own opinion as to the desirability of the results stemming from that interpretation. (*Belfield* v. *Coop* (1956), 8 Ill.2d 293, 306-307, 134 N.E.2d 249; *People* v. *McCoy* (1st Dist. 1975), 29 Ill.App.3d 601, 607, 332 N.E.2d 690, *aff'd* (1976), 63 Ill.2d 40, 344 N.E.2d 436.) We note, however, that an order of court is needed to transfer a defendant from the custody of the Department to the custody of the Sheriff, and that the Department is not empowered on its own to relinquish such custody.[23]

On February 18, 1977, the Department petitioned for defendant's release from ISPI on bail or recognizance. Thereafter the trial court vacated its order requiring the Department to hold defendant; and the Public Defender applied to the Department for defendant's voluntary admission. Defendant was accepted and his training in sign language continued. When the Department told the court in September of 1977 that

[23] Apparently, on October 3, 1977, the Department transferred the defendant without a court order to the Sheriff who accepted him without a court order. At least we can find no such orders in the record.

it planned to discharge defendant to the Sheriff's custody, the Conservator and the Public Defender obtained a temporary restraining order. Once the temporary restraining order was dissolved and defendant was taken to jail, the Public Defender again executed forms for defendant's voluntary or informal admission. The request was denied.

The Conservator now contends that the Department's refusal to accept defendant in a voluntary or informal status was an abuse of discretion. He notes that during the commitment hearing, Dr. Page-El testified that while defendant is not retarded, he has a neurological impairment which fits into the classification of developmental disability. As the doctor's testimony established that defendant's impairment meets the statutory definition of "developmentally disabled," the Conservator maintains the Department abused its discretion by refusing to admit defendant as a voluntary or informal admission. Moreover, the Conservator points out that via a recent amendment to the MHC, adequate and humane care and treatment include the regular, daily use of sign language for hearing-impaired patients who use sign language as a primary mode of communication. (Ill. Rev. Stat. 1977, ch. 91½, par. 12-1.) Lastly, the Conservator emphasizes several of the trial court's statements: that no training program was successful until the Department's program; that defendant needs to make continued progress in sign language; and that all training has now beeen discontinued at the jail.

[12, 13] The director contends that the Conservator may not raise the issue of abuse of discretion by the Superintendent of ISPI because the Conservator failed to file a notice of cross-appeal. (Ill.Rev.Stat. 1977, ch. 110A, par. 303(a).) The issue has been waived. On the failure of appellee to take or prosecute a cross-appeal, we are confined to issues raised by the appellant and will not consider errors urged by appellee when they are not related to the issues raised by the appellant.

Clodfelter v. *Van Fossan* (1946), 394 Ill. 29, 33, 67 N.E.2d 182; *National Football League Properties, Inc.* v. *Dallas Cap & Emblem Manufacturing, Inc.* (1st Dist. 1975), 26 Ill.App.3d 820, 821, 327 N.E. 2d 247.

[14] Lastly, the Conservator argues that the trial court had the authority to order the Department to retain custody of defendant because the Department failed to satisfy the legal prerequisites for defendant's discharge. Specifically, the Conservator complains that the Department failed to follow the directions in section 100-15 of the MHC (Ill.Rev.Stat.1977, ch. 91½, par. 100-15), which provide for the applicable discharge procedures for patients. The Director responds that defendant's transfer to the Sheriff did not involve an absolute discharge from treatment because defendant's admission to the Department never occurred pursuant to the MHC. Since defendant was never adjudged in need of hospitalization, he was never admitted to the Department for that purpose. Thus, the discharge provisions of 100-15 were not applicable to defendant's "release" to the Sheriff.

III.

[15] The Director also maintains that the court had no statutory authority to order the Department to collaborate with the Public Defender in developing a training program for defendant. We again agree. Section 5-2-2 of the UCC clearly provides that once a defendant is found unfit, the trial court must remand him to the Department to determine if he requires hospitalization, and then release him on bail or recognizance if he does not require hospitalization. There is no implicit authority to order the Department to develop a training program.

[16-19] Where the language used in a statute is plain and certain, it must be given effect by the courts and we cannot

legislate but must interpret the law as announced by the legislature. (*Smith* v. *Board of Education* (1950), 405 Ill. 143, 148, 89 N.E.2d 893.) Our only legitimate function is to declare and enforce the law as enacted by the legislature, to interpret the language used by the legislature where it requires interpretation and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning. (*Belfield* v. *Coop* (1956), 8 Ill.2d 293, 307, 134 N.E.2d 249.) It is not within our province to take from or enlarge the meaning of a statute by reading into it language which will, in our opinion, correct any supposed omission or defects. (*American Steel Foundries* v. *Gordon* (1949), 404 Ill. 174, 180-181, 88 N.E.2d 465.) We have no right to say that the legislature did not mean what in plain language it said and must give effect to the legislative intention regardless of the consequences. (*Beckmire* v. *Ristokrat Clay Products Co.* (2nd Dist. 1976), 36 Ill.App.3d 411, 415, 343 N.E.2d 530.) Thus, expediency born of changing circumstances and conditions will not alter the meaning of plain and ordinary language used in a statute. *Dean Milk Co.* v. *City of Chicago* (1944), 385 Ill. 565, 571, 53 N.E.2d 612.

[20] Here the statute plainly provided the trial court with direction. In light of the history of this case and this defendant, we appreciate the court's dilemma, but a court may not inject provisions not found in a statute, however desirable or beneficial they may be. The circuit court may only perform those actions specifically authorized by statute and absent specific authority from the legislature may not act. See *In re Washington* (1977), 65 Ill.2d 391, 3 Ill.Dec. 723, 359 N.E.2d 133; *People* v. *Breen* (1976), 62 Ill.2d 323, 342 N.E.2d 31; *Harper College Faculty Senate* v. *Board of Trustees* (1st Dist. 1977), 51 Ill.App.3d 443, 9 Ill.Dec. 488, 366 N.E.2d 999.

IV.

[21-24] Having determined that the trial court had no authority to order the Department to collaborate in the development of a program, it follows that the court could not properly issue a writ of mandamus against the Director requiring him to direct and implement such a program. A writ of mandamus will not issue to compel a party to perform an act unless it is affirmatively made to appear that it is his clear duty to do so. (*White* v. *Board of Appeals* (1970), 45 Ill.2d 378, 381-382, 259 N.E.2d 51; *People ex rel. Adamowski* v. *Dougherty* (1960), 19 Ill.2d 393, 400, 167 N.E.2d 181; *La Salle National Bank* v. *Riverdale* (1959), 16 Ill.2d 151, 160, 157 N.E.2d 7; *People ex rel. Pignatelli* v. *Ward* (1949), 404 Ill. 240, 244, 88 N.E.2d 461; *People ex rel. Sanitary District* v. *Schlaeger* (1945), 391 Ill. 314, 331-332, 63 N.E.2d 382.) Moreover, mandamus is not proper where the right of the petitioner must be established or the duty of the officer sought to be coerced must first be determined. (*Retail Liquor Dealers Protective Association* v. *Schreiber* (1943), 382 Ill. 454, 460-461, 47 N.E.2d 462; *People ex rel. Rude* v. *County of LaSalle* (1941), 378 Ill. 578, 580, 39 N.E.2d 25.) Thus, the writ of mandamus confers no new authority upon the person or body against whom it is issued—it creates no duty, but will issue only when the duty and authority to act already exist without the writ. *People ex rel. Brecheisen* v. *Board of Review of Lake County* (1936), 363 Ill. 106, 112-113, 1 N.E.2d 402.

[25, 26] Although the Director had no clear duty to direct and implement a training program for defendant, the Conservator contends that the writ properly issued because the Department was subject to the court's discretion in setting conditions of bail. As a condition of bail, the court may require an unfit, uncommittable defendant to submit to or secure treatment for his mental condition. (Ill.Rev.Stat.1975, ch. 38, par. 1005-2-2(a).) The Conservator argues that the court

exercised its sound discretion by ordering the most obvious supplier of mental treatment in this state to provide it. While the court may require a defendant to secure treatment, it may not order the Department to provide it to an unfit defendant whom the Department has already determined does not need hospitalization. The Department operates within its own guidelines; and the onus is on the unfit, uncommittable defendant to locate a program offering appropriate treatment. For the reasons discussed above, section 100-15 of the MHC, including the after-care provisions, is inapplicable to the case at bar. Neither that section nor section 504 of the Federal Rehabilitation Act of 1973 authorized the writ of mandamus. That section prohibits discrimination on the basis of mental or physical handicap in any program receiving Federal financial assistance. (29 U.S.C. § 794.) The Act presumes that the individual in question is lawfully within a state program and that the program receives federal assistance. (See *Sites* v. *McKenzie* (N.D.W.Va.1976), 423 F.Supp. 1190, 1197.) The record before us does not establish either fact.

[27] The Conservator claims that without the writ of mandamus defendant will be deprived of due process, a speedy trial, equal protection and the spirit of *Jackson* v. *Indiana* (1972), 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435. These constitutional questions are more directly related to defendant's habeas corpus action; and we will, therefore, review them separately in that context. In our opinion, the Conservator's true complaint is that the state of Illinois wants defendant to stand trial yet it deprives him of the tools necessary to render him fit to stand trial. However, the Department and its Director have no legal obligation to implement a training program; and we cannot enforce moral obligations. Mandamus against an executive official is a remedy available only to enforce fixed legal duties and not questions of morality, except as they coincide with legal rights and plain duties. *In re Goldberg* v. *Hoffman* (7th Cir. 1955), 225 F.2d 463, 466.

The present statutory scheme binds the courts. Once again the history of the Donald Lang case manifests the desperate need for substantial change in Illinois law. Until the legislature enacts appropriate legislation to deal with situations such as this, we can only endeavor to follow the mandate of present law. We can do no more.

V.

Section 5 of the Habeas Corpus Act provides in part that the court shall award a writ of habeas corpus, unless it appears from the petition or the documents annexed thereto that the party cannot be discharged, admitted to bail, or otherwise relieved. (Ill.Rev.Stat.1977, ch. 65, par. 5.) In this case defendant's bail was set at $50,000, which the Conservator could execute. The Public Defender maintains, however, that the act of setting bond was an inadequate remedy and that it did not satisfy the rule of *Jackson* v. *Indiana*. Moreover, defense counsel argue that our courts recognize the propriety of a habeas corpus action where circumstances of a defendant's extended incompetency conflict with his assertion of constitutional rights. *People* v. *Culhane* (1st Dist. 1975), 34 Ill.App.3d 158, 160, 340 N.E.2d 63, citing *People ex rel. Myers* v. *Briggs* (1970), 46 Ill.2d 281, 263 N.E.2d 109; *People* v. *Byrnes* (2nd Dist. 1972), 7 Ill.App.3d 735, 288 N.E.2d 690.

By its order dated October 24, 1977, the trial court set defendant's bond as $50,000. It also required that within 30 days from the date of defendant's release on bail, defendant was to be placed in a training program which had as its purpose the teaching of communication skills in order to make him fit to stand trial. The Public Defender concedes that the conditions on bail are reasonable in light of *People ex rel. Hemingway* v. *Elrod* (1975), 60 Ill.2d 74, 322 N.E.2d 837 and *Eaby*. Yet defendant's attorneys urge that the history of their client's encounters with the legal system demonstrate why defendant must apply for release from all vestiges of custody.

[28] In *Myers*, our supreme court permitted defendant's habeas corpus action where the superintendent of a state institution wrote to the Department's attorney, detailing defendant's failure to learn communication. The court held that the letter or report of evaluation was a cause for discharge. When a prisoner is in custody by virtue of lawful court process, he may become entitled to his discharge "by some act, omission or event which has subsequently taken place." (Ill.Rev.Stat.1977, ch. 65, par. 22; see also *People ex rel. Jefferson* v. *Brantley* (1969), 44 Ill.2d 31, 34, 253 N.E.2d 378; *People ex rel. Skinner* v. *Randolph* (1966), 35 Ill.2d 589, 590, 221 N.E.2d 279; *People ex rel. Castle* v. *Spivey* (1957), 10 Ill.2d 586, 593, 141 N.E.2d 321.) The *Myers* court commented that:

> "[T]his defendant, handicapped as he is and facing an indefinite commitment because of the pending indictment against him, should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released." (46 Ill.2d 281, 288, 263 N.E.2d 109, 113.)

Although the case was later reinstated, the state was unable to proceed to trial due to the death of the principal witness. Defendant was released.

In 1971, defendant was indicted for a second murder; and in 1972, he was tried and convicted. As of January 1, 1973, sections 5-2-1 *et seq.* of the UCC became operative. When we reversed the conviction in *Lang*, the cause was remanded with directions that defendant's fitness to stand trial be determined pursuant to section 5-2-1. We noted that while the trial court tried to follow the *Myers* dictates, it appeared quite clear "that there were no trial procedures which could effectively compensate for the handicaps of a deaf mute with whom there could be no communication." (26 Ill.App.3d 648; 653, 325 N.E.2d 305, 308; compare *Pate* v. *Robinson* (1966), 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815.) At the present time defendant is unfit to stand trial and not in need of hospi-

talization. The Public Defender contends that under current law defendant may no longer demand trial under the *Myers* rationale and that, therefore, he must apply for his freedom. The crux of this ill-defined claim is the rule from *Jackson* v. *Indiana*.

[29] The United States Supreme Court held in *Jackson* v. *Indiana* that:

> "[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." (406 U.S. 715, 738, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435.)

Although the Public Defender argues that *Jackson* v. *Indiana* is a literal "commit or release" rule and that section 5-2-2 does not satisfy such rule, we held otherwise in *Ealy*. There we said that *Jackson* v. *Indiana* does not prohibit the trial court from releasing the unfit, uncommittable defendant subject to the statutory provisions of 5-2-2 and the requirements for bail set forth in sections 110-5(a)[24] and 110-10(a)[25] of the Code of

[24] Section 110-5(a) of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat.1975, ch. 38, par. 110-5(a)) provides:

"(a) The amount of bail shall be:

(1) Sufficient to assure compliance with the conditions set forth in the bail bond;

(footnote 24 continued on following page)

[25] Section 110-10(a) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1975, ch. 38, par. 110-10(a)) provides:

"(a) If a person is admitted to bail before conviction the conditions of the bail bond shall be that he will:

(footnote 25 continued on following page)

Criminal Procedure. (49 Ill.App.3d 922, 935, 7 Ill.Dec. 864, 365 N.E.2d 149.) In the case at bar, therefore, defendant could be properly released on bail or recognizance "under such conditions as the court finds appropriate." Ill.Rev.Stat. 1975, ch. 38, par. 1005-2-2(a).

It is clear from the record that the Public Defender believes *Jackson* v. *Indiana* has been violated because defendant is making no progress toward becoming fit while he is incarcerated. The trial court said that when it is determined that defendant will be able to stand trial in the foreseeable future, his continued detention may be justified only by continued progress toward the goal of fitness. Yet the Public Defender maintains that there has been no determination that defendant will be fit in the foreseeable future—only Dr. Donoghue's opinion that within three to five years of intensive training defendant might be fit. Like the trial court, we accord great weight to Dr. Donoghue's opinion in light of his special expertise with the deaf. The obvious problem is that defendant currently resides in the Cook County Jail where all training has ceased. We think it clear that the Conservator's failure to post bond and defendant's resulting detention may not be urged by the Public Defender as a basis for release.

(footnote 24 continued from preceding page)

(2) Not oppressive;

(3) Commensurate with the nature of the offense charged;

(4) Considerate of the past criminal acts and conduct of the defendant;

(5) Considerate of the financial ability of the accused."

(footnote 25 continued from preceding page)

(1) Appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court;

(2) Submit himself to the orders and process of the court; and

(3) Not depart this State without leave; and

(4) Not violate any criminal statute of any jurisdiction; and

(5) Such other reasonable conditions as the court may impose."

In its order denying the petition for a writ of habeas corpus, the trial court stated that the Conservator and the Public Defender had informed the court that they had established, or would establish in the near future, a training program for defendant. If the Conservator posted bail and defendant's training program were instituted, then the special conditions placed on bail by the court would have been met. The court concluded, therefore, that a writ of habeas corpus did not lie. However, so far as we can determine, the program was never established. Although there were extended negotiations with the Crossroads Rehabilitation Center of Indianapolis, Indiana, the plan for defendant's training there never came to fruition. The county prosecutor for Marion County, Indiana, objected to defendant's presence in his county while an indictment was pending in Cook County. The state in its brief did not respond to the Public Defender's allegations that the State's Attorney of Cook County informed the Indiana prosecutor of the plan, invited him to the proceedings, and specifically sabotaged the Crossroads plan. At oral argument of the cause the state admitted certain contact with the Indiana prosecutor but denied any attempt to sabotage the plan. In any event the proposed training at Crossroads did not occur and the state never offered any alternative plans for rendering defendant fit to stand trial. The Public Defender contends that the state has done indirectly what it could not do directly; *i.e.*, keep defendant in custody without trying him for murder.

[30] In recognition of the directive of *Jackson* v. *Indiana*, the voluminous testimony as to defendant's need for communication training and the fact of his continued custody for seven years, we think defendant must be released on bail. The court's order of October 24, 1977, first set bail at $50,000 and noted the applicability of the 10% deposit provision. The bail is in an amount appropriate for the nature of the charge and the ability of the defendant, by the Conservator, to post. We believe the bail is wholly reasonable. Equally reasonable is the second

condition that defendant be placed in a training program within 30 days of his release. The order of October 24, 1977 also provided that the order of October 11, 1977 was to remain in full force and effect subject to the two conditions above. We have reversed the prior order issuing a writ of mandamus against the Director. In essence, therefore, defendant must be placed in a training program which has as its purpose the teaching of communication skills in order to make him fit to stand trial, but the Department and its Director may not be ordered to design such a program.

The Conservator and the Public Defender have mistakenly assumed that the Department has the sole obligation to design a training program for defendant. The Department may not be ordered to train defendant since has has been determined not in need of hospitalization. We think the Conservator and the Public Defender, as defendant's true representatives, are the parties charged with the legal obligation of taking such action as is necessary to either locate or design the intensive communication program required. We do recommend, however, that the Department, the Director, and the superintendents of various Department facilities give serious consideration to accepting defendant as an informal or voluntary admission. Having been relieved of the burden of unauthorized court orders, the Department should be more inclined to exercise its discretion in defendant's favor. The defendant is embroiled in our legal system because of the pending indictment; the people of this state have an interest in rendering defendant fit to stand trial so that the criminal trial can proceed. We would hope that the State's Attorney would assist, as fully as possible, in any training program.

To ensure that the trial court is fully apprised of defendant's continuing progress toward the goal of fitness, we also set an additional condition of bail. Every 30 days after defendant's placement in a program, the Conservator and the Public Defender shall submit to the circuit court a detailed written

report on defendant's progress. We suggest that the Department and the state may also wish to contribute their efforts toward a training program; and any such efforts or suggestions should be directed to the Conservator and the Public Defender. Nevertheless, the primary responsibility for defendant's training remains with the Conservator and the Public Defender who are hereby ordered to submit monthly joint reports on defendant's progress to the circuit court.

VI.

Lastly, the Public Defender maintains that the court erred by failing to dismiss the indictment pending against defendant. In *People* v. *Lawson* (1977), 67 Ill.2d 449, 455, 10 Ill.Dec. 478, 367 N.E.2d 1244, the Illinois Supreme Court held that the trial court has the inherent authority to dismiss an indictment where there has been a clear denial of due process even though that ground is not stated in the statutory list of grounds for dismissal of charges. (Ill.Rev.Stat.1975, ch. 38, par. 114-1.) Defense counsel contend that the denial of training to defendant which might render him fit in three to five years is such a denial of due process. According to the Public Defender, the clear denial of due process here, when *Lawson* is interpreted with *Jackson* v. *Indiana*, requires that the pending indictment be dismissed.

[31] We recently said in *People* v. *Williams* (1st Dist. 1977), 48 Ill.App.3d 842, 850, 6 Ill.Dec. 386, 362 N.E.2d 1306, that *Jackson* v. *Indiana* cannot be interpreted to require a state to either try unfit defendants or dismiss the pending charges against them. *Williams* also made clear that the prescription of bail or recognizance under 5-2-2(a) implies the pendency of the indictment or else there would be no need for bail or recognizance bond to secure the defendant's return. (48 Ill.App.3d 842, 848, 6 Ill.Dec. 386, 362 N.E.2d 1306.) Furthermore, the court in *Lawson* cautioned that its holding must not be construed as an invitation to disregard statutory provisions

on dismissal. (67 Ill.2d 449, 457, 10 Ill.Dec. 478, 367 N.E.2d 1244.) In view of the special conditions now set on bail, we think it is premature to dismiss the indictment. Until the Conservator posts bail and defendant is placed in a training program, there can be no accurate gauge of defendant's progress. The Public Defender's claim that the indictment should be dismissed is premised on the belief that the denial of training constitutes a denial of due process. If the special conditions now placed on bail are met, however, the due process claim is vitiated.

[32, 33] Nor can we agree that defendant has already lost his constitutional right to a speedy trial. In *Barker* v. *Wingo* (1972), 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101, the United States Supreme Court adopted a four part balancing test to determine when the right to a speedy trial has been violated. The factors to be considered are: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of the right; and (4) prejudice to the defendant. Here the reason for the delay is of utmost importance: defendant's unfitness to stand trial. As we indicated in *Williams*, the legislature has determined that the right to a speedy trial is held in abeyance during the continuance of a defendant's condition of unfitness. (48 Ill.App.3d 842, 849, 6 Ill.Dec. 386, 362 N.E.2d 1306.) Until the legislature alters the present statutory scheme inherent in section 5-2-2 *et seq.* and section 103-5 of the Code of Criminal Procedure, defendant's right to a speedy trial may be diluted. Instead, the issue would have to be raised in the context of *Jackson* v. *Indiana*, as was done here. In our opinion, *Jackson* v. *Indiana* has not yet been violated, but that the outcome of defendant's training is the key. We think that if defendant can be rendered fit to stand trial in three to five years, as Dr. Donoghue testified, then defendant should be allowed that chance. On the other hand, we also think that the cause should be monitored continuously in order that defendant's constitutional rights are not forgotten.

VII.

The case of Donald Lang cries out for legislative attention. As a result of two separate murder charges, defendant has spent 11 of the past 12 years in custody. He has been in custody since 1971 under the current indictment. Despite the changes brought about by the enactment of the UCC, the state of Illinois still cannot effectively dispose of the multitude of legal problems presented by unfit, uncommittable defendants. We have said in this opinion that the circuit court erred by going beyond the direction of the statute. At the same time, however, we appreciate that the trial court undertook that course of action because the legislature has failed to afford guidance.

In Illinois the Department may treat unfit defendants only where they require hospitalization. In *Ealy*, we demonstrated that "a person charged with a felony may be found unfit to stand trial, but not sufficiently in need of mental treatment under current standards to be committed." (49 Ill.App.3d 922, 929, 7 Ill.Dec. 864, 869, 365 N.E.2d 149, 154.) We said that the *Ealy* case cried out for prompt and clear legislative action. None has been forthcoming. We no longer have a James Ealy before us; now we encounter Donald Lang, the illiterate deaf-mute who possesses the notorious ability to stymie the Illinois legal system. The people of the state of Illinois expect the courts to follow and interpret the law, but not to create it. Judicial activism is the result of legislative inaction.

The Director has brought to our attention that other states authorize their departments of mental health to treat an unfit defendant for the conditions which underlie or are the cause of his unfitness for trial. In Michigan the court is authorized to order treatment of an unfit defendant in a department facility. (Mich.Com.Laws Ann., § 330.2032.) In Wisconsin the court is authorized to commit an unfit defendant to the department's custody. (Wis.Stat.Ann., § 971.14.) In California the court is authorized to order the sheriff to deliver an unfit defendant to a

state hospital. West Ann.Cal.Penal Code, § 1370.) Yet in Illinois the court is only authorized to remand an unfit defendant for a hearing as to his need for mental treatment. In our opinion the statutory guidelines for hospitalization should authorize treatment for the conditions which underlie or cause a defendant's unfitness to stand trial. We urge the legislature to remedy this situation.

VIII.

For the sake of clarification, we will summarize our holdings. In appeal no. 77-1541, that portion of the order entered by the court on October 3, 1977, which required the Department to file a petition detailing a program, is vacated. The writ of mandamus entered against the Director on that day and reduced to writing on October 11, 1977, is also vacated. The order denying the Director's motion to vacate, alter or amend that order is reversed. In appeal no. 78-250, the order entered on November 29, 1977 is affirmed insofar as it denied the petition for a writ of habeas corpus. Pursuant to the original jurisdiction granted us by article VI, section 6 of the 1970 Illinois Constitution, we also reset the special conditions on defendant's bail. Those conditions are as follows:

(1) Bail is set at $50,000, which the Conservator may execute on defendant's behalf. The provision allowing for the deposit of 10% of the bail set is applicable.

(2) Within 30 days of defendant's release on bail, the Conservator and the Public Defender shall place him in a training program which has as its purpose the teaching of communication skills in order to render defendant fit to stand trial.

(3) Every 30 days thereafter the Conservator and the Public Defender shall submit to the circuit court a joint

written report on defendant's progress toward the goal of attaining fitness.

Affirmed in part; reversed in part; vacated in part; and order entered.

STAMOS, P. J., and BROWN, J., concur.

(Nos. 51051, 51148 cons.—Appellate court affirmed in part and reversed in part; cause remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. DONALD LANG, Appellant.—(Julius Lang, Conservator, Appellant, v. Robert A. DeVito, Director of Mental Health and Developmental Disabilities, Appellee.)

Opinion filed May 24, 1979.—Rehearing denied June 29, 1979.

MR. JUSTICE RYAN delivered the opinion of the court:

For 14 years the State has been concerned with what to do with Donald Lang, an illiterate deaf mute who has virtually no ability to communicate with other people in any recognized language system. Notwithstanding this severe handicap, Lang has twice been charged with murder, and the State insists that he poses an extreme danger to society. He is admittedly unfit to stand trial and has been held to be not in need of mental treatment and not civilly committable to a mental institution. His legal history for the past 14 years illustrates the nature and complexity of the problem.

In 1965 the State charged Lang with the murder of a woman. He was found unfit to stand trial. His lawyer, who had extensive experience in defending deaf persons, realized that Lang faced indefinite civil commitment and requested that he be tried for murder. The lawyer agreed to waive Lang's constitutional right not to be tried. The request was denied, and Lang was civilly committed to the Department of Mental Health. (*People* v. *Lang* (1967), 37 Ill. 2d 75.) Two years after the commitment the superintendent of the institution in which Lang was confined wrote a letter to the counsel for the Department stating that Lang was unlikely ever to become fit for trial. Sign language training had been completely ineffective. The superintendent recommended that Lang's lawyer be contacted and that Lang be criminally tried. Lang's lawyer then filed a petition for a writ of *Habeas corpus,* contending that

Lang was being imprisoned for life even though he had never been tried for or convicted of a crime. This court, in *People ex rel. Myers* v. *Briggs* (1970), 46 Ill. 2d 281, 288, held that Lang, facing indefinite commitment, "should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released." The court remanded the cause for trial. The State subsequently dismissed charges against Lang because the principal witness had died. Lang was released from confinement in February 1971.

In July 1971, Lang was again arrested and charged with the murder of another woman. This second murder involved circumstances quite similar to those of the other homicide. Once again, Lang's lawyer requested that he be tried. The trial court, following the *Myers* rationale, proceeded with a trial, taking special precautions in an attempt to compensate for Lang's inability to communicate. A jury convicted Lang, and he was sentenced to 14 to 25 years' imprisonment. The appellate court subsequently reversed Lang's conviction, stating that though the evidence clearly established guilt, no trial procedures could effectively compensate for the handicap of a deaf mute with whom there could be no communication. The appellate court remanded the cause for a fitness hearing. *People* v. *Lang* (1975), 26 Ill. App. 3d 648.

At a March 1976 fitness hearing, the trial court ruled Lang unfit and remanded him to the Department of Mental Health and Developmental Disabilities (Department), pursuant to provisions in the Unified Code of Corrections (Ill. Rev. Stat. 1975, ch. 38, pars. 1005-2-1, 1005-2-2), which provide in part:

"Sec. 5-2-1. Fitness for Trial or Sentencing.

(a) For the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable:

(1) to understand the nature and purpose of the proceedings against him; or

(2) to assist in his defense.

* * *

Sec. 5-2-2. Defendant Found Unfit—Commitment and Release.

(a) If the defendant is found unfit to stand trial or be sentenced, the court shall remand the defendant to a hospital, as defined by the Mental Health Code of 1967, and shall order that a hearing be conducted in accordance with the procedures, and within the time periods, specified in such Act. The dispositon of defendant pursuant to such hearing, and the admission, detention, care, treatment and discharge of any such defendant found to be in need of mental treatment, shall be determined in accordance with such Act. If the defendant is not ordered hospitalized in such hearing, the Department of Mental Health and Development Disabilities shall petition the trial court to release the defendant on bail or recognizance, under such conditions as the court finds appropriate, which may include, but need not be limited to requiring the defendant to submit to or to secure treatment for his mental condition.

(b) A defendant hospitalized under this Section shall be returned to the court not more than 90 days after the court's original finding of unfitness, and each 12 months thereafter. At such re-examination the court may proceed, find, and order as in the first instance under paragraph (a) of this Section. If the court finds that defendant continues to be unfit to stand trial or be sentenced but that he no longer requires hospitalization, the defendant shall be released under paragraph (a) of this Section on bail or recognizance. Either the State or the defendant may at any time petition the court for review of the defendant's fitness.

(c) A person found unfit under the provisions of this Article who is thereafter sentenced for the offense charged at the time of such finding, shall be credited with time during which he was confined in a public or private hospital after such a finding of unfitness. If a defendant has been confined in a public or private hospital after a finding of unfitness under Section 5-2-6 for a period equal

> to the maximum sentence of imprisonment that could be imposed under Article 8 for the offense or offenses charged, the court shall order the charge or charges dismissed on motion of the defendant, his guardian, or the Director of the Department of Mental Health and Developmental Disabilities."

Following that fitness hearing, Lang was placed in the Illinois State Psychiatric Institute, a Department facility, where he again received sign language instruction. Sometime later the Department concluded that Lang was not a "person in need of mental treatment" as that term was defined in section 1-11 of the 1967 Mental Health Code (Ill. Rev. Stat. 1975, ch. 91½, par. 1-11). This section stated:

> "Sec. 1-11. 'Person In Need of Mental Treatment', when used in this Act, means any person afflicted with a mental disorder, not including a person who is mentally retarded, as defined in this Act, if that person, as a result of such mental disorder, is reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs. This term does not include a person whose mental processes have merely been weakened or impaired by reason of advanced years."

A hearing was held and the trial judge ruled in December of 1976 that Lang did not need "mental treatment." Lang was unfit, the court ruled, because of a "combined physical and mental condition." Land did not have a "clearly diagnosed mental disorder" and was not mentally retarded. Because of these facts, Lang could not be civilly committed under the Code. Instead, the court ordered Lang released on bail (as provided in section 5-2-2(a) of the Unified Code of Corrections (Ill. Rev. Stat. 1975, ch. 38, par. 1005-2-2(a)), providing that he must continue in a training program and reside in a secure setting. The court also directed the Department to collaborate

with Lang's attorneys in developing an appropriate program. Shortly thereafter the Department petitioned for the release of Lang from the Psychiatric Institute, and in March 1977 the court vacated an order requiring the Department to hold Lang. Lang's conservator then filed an application with the Department for Lang's voluntary or informal admission. Lang remained at the Psychiatric Institute receiving therapy until October 1977, at which time the Department received permission to discharge him to Cook County jail. Lang has been incarcerated in the jail since that time and receives no therapy.

Althoush the trial court allowed the Department to discharge Lang in October 1977, the judge concurrently ordered that a writ of *mandamus* issue directing the Department to create and implement an adequate and humane care and treatment program. The trial court had been unable to find an alternative non-Department program for Lang. On appeal, the appellate court reversed the *mandamus* order but also affirmed an order denying a separate petition for *habeas corpus* filed on Lang's behalf by the public defender. (62 Ill. App. 3d 688.) This case is a consolidation of two appeals from that appellate decision.

Four sets of lawyers advance different solutions to the program of Donald Lang on this appeal. Lang's conservator, unable to find a training program that will accept Lang because of the pending murder charge, and unable to persuade the Department to treat Lang, cannot obtain his ward's release on bail. The conservator thus desires a writ of *mandamus* compelling action by the Department. The Department, claiming that it has no statutory authority to treat people who are not in need of mental treatment refuses to accept or aid Lang, who, according to it and the trial court, is not afflicted with a mental disorder. The public defender, in turn, argues that charges against Lang must be dropped because Lang cannot be tried, cannot be civilly committed, and cannot comply with impossible conditions of bail. Finally, the Cook County State's

Attorney insists that Lang's constitutional rights have not been violated, given the fact that reasonable bail has been set. The defendant himself, the State contends, has the obligation to obtain treatment. In addition, the State's Attorney urges that Lang presents a serious danger to society.

Another complication in this case involves an apparent change in the prognosis for Lang's condition. Until recently, all of the experts considered Lang permanently unfit because of a combination of physical defects, personality defects, and mental retardation. Repeated attempts in the past to train Lang failed. Following the March 1976 placement in the Psychiatric Institute, however, Lang made noticeable progress in learning sign language. This progress occurred primarily under the instruction of one specialist, a woman toward whom Lang developed a close personal attachment. At the bail hearings, this specialist, and several experts on the testing of deaf persons, testified that Lang's intelligence was normal to bright-normal, and that Lang might be fit to stand trial in 3 to 5 years.

The United States Supreme Court and this court have repeatedly held that trial of an unfit defendant violates due process. *Drope* v. *Missouri* (1975), 420 U.S. 162, 43 L. Ed. 2d 103, 95 S. Ct. 896; *Pate* v. *Robinson* (1966), 383 U.S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836; *People* v. *McCullum* (1977), 66 Ill. 2d 306; *People* v. *Barkan* (1970), 45 Ill. 2d 261. See generally, American Bar Foundation, The Mentally Disabled and the Law 408-23 (S. Brakel and R. Rock ed. 1971); Note, *Illinois Fitness For Trial: Processes, Paradoxes, Proposals,* 6 Loy. Chi. L.J. 678 (1975).

After the Supreme Court decided *Dusky* v. *United States* (1960), 362 U.S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788, in which it stated its definition of fitness, various formulations of the fitness test have been suggested. The Illinois statutory definition provides a typical example. A defendant is unfit to stand trial if, "because of a mental or physical condition, he is unable: (1)

to understand the nature and purpose of the proceedings against him; or (2) to assist in his defense." (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-1.) (See generally, Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems,* 45 U. Chi. L. Rev. 21 (1977); Note, *The Identification of Incompetent Defendants; Separating Those Unfit for Adversary Combat From Those Who Are Fit,* 66 Ky. L.J. 666 (1978).) No one questions Lang's unfitness.

Though the fitness concept has provided substantial due process protection for unfit criminal defendants, it has also generated several side effects. Under traditional procedures, a determination of unfitness resulted in virtually automatic commitment to a mental institution until fitness was attained. If the defendant never became fit, he could thus remain confined permanently. Because of this fact, the unfitness-commitment procedure often produced extremely long periods of confinement for criminal defendants who, had they been fit, might have plea bargained to a relatively light sentence, obtained an outright or insanity acquittal, or received a prison sentence subject both to maximum limits and parole. In short, unfitness determinations often produced confinement disproportionately long in light of the underlying criminal conduct. These unfit defendants obtained none of the procedural protections provided involuntary admittees and often remained in institutions far longer than did civilly committed patients. See generally, Laboratory of Community Psychiatry, Harvard Medical School, Competency to Stand Trial and Mental Illness (1974); A. Brooks, Law, Psychiatry and the Mental Health System 332 (1974); Burt & Morris, *A Proposal for the Abolition of the Incompetency Plea,* 40 U. Chi. L. Rev. 66 (1972); American Bar Association Commission on the Mentally Disabled, Legal Issues in State Mental Health Care: Proposals for Change, *Incompetence to Stand Trial on Criminal Charges,* 2 Mental Disability L. Rep. 617 (1977).

The decision of the United States Supreme Court in *Jackson* v. *Indiana* (1972), 406 U.S. 715, 32 L. Ed. 2d 435, 92 S. Ct. 1845, drastically altered the practice of committing those persons charged with a crime who were found unfit to stand trial. In that case, the defendant, who was charged with a minor violation, was committed under Indiana law for an indefinite period. The defendant, Jackson, like Lang, was a deaf mute who could not communicate with others. The court, after extensively discussing Indiana's failure to demonstrate that Jackson presented a danger to himself or others, stated:

> "We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal." (*Jackson* v. *Indiana* (1972), 406 U.S. 715, 738, 32 L. Ed. 2d 435, 451, 92 S. Ct. 1845, 1858.)

The commit-or-release language of this quotation has been made the focal point of the problem in our case. This problem is accentuated by the accepted belief in Illinois that the unfitness standards are different from the standards for involuntary commitment.

Too often, in considering whether a person is subject to involuntary commitment, attention has focused on the nature of the disability as specified in the statute; that is, Is the individual in need of mental treatment or mentally retarded? (Ill. Rev. Stat. 1975, ch. 91½, par. 2-1.) The term "person in need of mental treatment" was defined in the statute as a person

afflicted with a mental disorder. (Ill. Rev. Stat. 1975, ch. 91½, par. 1-11.) It is this requirement that has so often caused the difficulty. Although a person may be unfit to stand trial because he cannot understand the nature and purpose of the proceedings against him or assist in his defense (Ill. Rev. Stat. 1975, ch. 38, par. 1005-2-1), he cannot be committed as a person in need of mental treatment if he is found not to be afflicted with a mental disorder.

By focusing on the absence of a mental disorder, adequate consideration has not been given to the more important condition necessary for involuntary commitment, which is also of prime significance in determining what disposition should be made of one who is unfit to stand trial. The Mental Health Code of 1967 provided that, to be committable, not only must the person in need of mental treatment be afflicted with a mental disorder but also as a result of that mental disorder the person must be *reasonably expected to be a danger to himself or others.* Ill. Rev. Stat. 1975, ch. 91½, par. 1-11.

The existence of the mental disability itself is no longer sufficient justification for involuntarily committing a person to a mental institution for an indefinite period of time. The United States Supreme Court in *O'Connor* v. *Donaldson* (1975), 422 U.S. 563, 575, 45 L.Ed. 2d 396, 406-07, 95 S. Ct. 2486, 2493, stated:

> "A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."

The Governor's Commission for Revision of the Mental Health Code of Illinois, in its 1976 report, recommended

changes both in the definition of those who are involuntarily committable and in the procedures for determining fitness to stand trial. Thereafter, the General Assembly repealed the Mental Health Code of 1967, consisting of sections 1-1 to 20-1 (Ill. Rev. Stat. 1977, ch. 91½, pars. 1-1 to 20-1), and replaced it with the Mental Health and Developmental Disabilities (MHDD) Code consisting of sections 1-100 to 6-107, by the enactment of Public Act 80-1414, effective January 1, 1979. The recommendations of the Governor's Commission with regard to involuntary commitment have been incorporated in sections 1-119 and 3-700 *et seq.* of the MHDD Code (Ill. Rev. Stat., 1978 Supp., ch. 91½, pars. 1-119, 3-700 *et seq.*). Section 3-700 of the Code provides that a person who may be involuntarily committed is "[a] person 18 years of age or older who is subject to involuntary admission." (Ill. Rev. Stat., 1978 Supp., ch. 91½, par. 3-700.) Thus the "person in need of mental treatment" designation of the Mental Health Code of 1967 has been removed. A "person subject to involuntary admission" is defined in section 1-119 as a "person who is mentally ill and who because of his illness is reasonably expected to inflict serious physical harm upon himself or another in the near future." (Ill. Rev. Stat., 1978 Supp., ch. 91½, par. 1-119.) The necessary requirement of dangerousness has been retained in the definition of one who is committable, but under this definition no longer need he be afflicted with a mental disorder. Although the person must be "mentally ill" the new code does not define that term. The Governor's Commission, by way of explanation of this recommended change, stated concerning the use of the term "mentally ill":

> "That term is left undefined as in prior codes, largely because any definition which could be made legally explicit would necessarily be so broad or circular as to preclude accurate application. By not providing an explicit statutory definition, a common law definition fashioned by the courts on a case-by-case basis is deemed to be preferable as it has been in the past." Report, Governor's Commission for Revision of the Mental Health Code of Illinois, 1976, at 14.

We see no need to perpetuate under the revision of the Code the hiatus which has heretofore existed because of the different standards used to determine fitness to stand trial and involuntary commitment. The "mental disorder" requirement has been removed as a prerequisite of involuntary commitment. Hereafter, if a person is found unfit to stand trial, he should be considered to be mentally ill under the MHDD Code unless his unfitness is due to a solely physical condition. If that person also meets the dangerousness requirement of the Code, he should be considered to be a "person subject to involuntary admission." (Ill. Rev. Stat., 1978 Supp., ch. 91½, par. 1-119.) However, as this court noted in *People* v. *Murphy* (1978), 72 Ill. 2d 421, 432-33, fitness speaks only within the context of trial. A person may be fit to stand trial, although upon other subjects his mind may be unsound or deranged. (*People* v. *Burson* (1957), 11 Ill. 2d 360, 369; *Withers* v. *People* (1961), 23 Ill. 2d 131.) Thus, our holding in this case does not suggest that one who may be classified as mentally ill will necessarily be unfit to stand trial.

The Governor's Commission for Revision of the Mental Health Code, in its report, also recommended changes in the Unified Code of Corrections concerning the determination of fitness to stand trial and procedures for subsequently handling those found to be unfit. The General Assembly did not enact legislation implementing these recommendations, although at the present time a bill designed to incorporate at least some of these recommendations is pending in the General Assembly (Senate Bill 0133, 1979 Session of the 81st General Assembly). Thus, at the present time, the law covering the procedures to be followed in determining the disposition of the defendant in this case incorporates only part of the recommendations of the Governor's Commission while leaving intact the provisions under sections 5-2-1 and 5-2-2 of the Unified Code of Correc-

tions (Ill. Rev. Stat. 1977, ch. 38, pars. 1005-2-1, 1005-2-2). Until the suggested changes are made, we find it necessary to determine the issues in this case under the law as it now exists. We find that the provisions of the MHDD Code effective January 1, 1979 (Ill. Rev. Stat., 1978 Supp., ch. 91½, par. 1-100 *et seq.*), in conjunction with the provisions of section 5-2-2 of the Unified Code of Corrections (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-2), provide a means of resolving the questions in our case that have heretofore confounded court and counsel.

Because of the commit-or-release language of the United States Supreme Court in *Jackson* v. *Indiana,* the public defender contends that Lang should be released, because it has not been determined that he will be able to stand trial in the foreseeable future. We do not agree. The interpretation which we have placed on the new MHDD Code, applied in conjunction with section 5-2-2 of the Unified Code of Corrections, complies with the dictates of *Jackson* v. *Indiana.* Under this construction Lang, if found to be dangerous, would not be held indefinitely as a person unfit to stand trial. His unfitness casts him into the class defined as mentally ill by the MHDD Code, and if he also meets the dangerousness test, he would be committed in the same manner as one who is involuntarily civilly committed. (Ill. Rev. Stat., 1978 Supp., ch. 91½, pars. 1-119, 3-700 *et seq.*) Pursuant to section 5-2-2 of the Unified Code of Corrections (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-2), he would be subject to detention, care, treatment and discharge under the provisions of the MHDD Code. This commitment would conform to the commit-or-release language of *Jackson* v. *Indiana.*

By following the relevant provisions of the two codes, Lang's rights will be fully protected. Section 5-2-2(b) of the Unified Code of Corrections (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-2(b)) provides for a periodic review of the finding of unfitness every 12 months and also that either the State or the defendant may, at any time, petition the court for a review of

the unfitness status. Section 3-900 of the MHDD Code (Ill. Rev. Stat., 1978 Supp., ch. 91½, par. 3-900) authorizes the filing of a petition for discharge by anyone who has been involuntarily committed, and section 3-901(b) of the MHDD Code (Ill. Rev. Stat., 1978 Supp., ch. 91½, par. 3-901(b)) provides that if the court finds at a hearing conducted on such a petition that the person is not subject to involuntary admission then it shall enter an order discharging the patient. If a person who has been found unfit to stand trial is later determined, under a hearing as provided in section 3-901, to no longer be dangerous and therefore not subject to involuntary admission, the Department, under section 5-2-2 of the Unified Code of Corrections (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-2), would then petition the court to admit the defendant to bail. *People ex rel. Martin* v. *Strayhorn* (1976), 62 Ill. 2d 296.

In *Jackson* v. *Indiana* the court noted that the defendant's commitment under Indiana law was not justified by any requirement of a finding of dangerousness. The court in that case discussed extensively *Greenwood* v. *United States* (1956), 350 U.S. 366, 100 L. Ed. 412, 76 S. Ct. 410, which construed a Federal statute authorizing the commitment of one found incompetent to stand trial as requiring release of an individual after a reasonable period of time *unless there is a finding of dangerousness.* By applying the construction we have placed on the provisions of the new MHDD Code (Ill. Rev. Stat., 1978 Supp., ch. 91½, par. 1-100 *et seq.*) to the present provisions of sections 5-2-1 and 5-2-2 of the Unified Code of Corrections (Ill. Rev. Stat. 1977, ch. 38, pars. 1005-2-1, 1005-2-2), the possibility of indefinitely committing an individual to a mental facility *solely* because he has been found unfit to stand trial is avoided.

Concern has been voiced over the holding of an individual under a criminal charge after a finding of unfitness without giving the opportunity to the defendant to have a determination

of whether he, in fact, committed the offense. In *People ex rel. Myers* v. *Briggs* (1970), 46 Ill. 2d 281, this court held that the defendant should be given a trial to determine whether he was guilty or whether he should be discharged. Such trials are often referred to as "innocent only" hearings. The Report of the Governor's Commission on Revision of the Mental Health Code of Illinois, 1976, at pages 184 and 185, suggested an amendment to the Unified Code of Corrections which would provide for a "discharge hearing." In *Jackson* v. *Indiana* the United States Supreme Court commented approvingly on such hearings and noted that some States have statutory provisions allowing an unfit defendant a trial at which to establish his innocence. In our case, Lang has been tried for the murder charge and found guilty by a jury. Although the appellate court reversed the conviction as a violation of due process of law because of Lang's apparent unfitness, nonetheless, the trial afforded an opportunity to determine from the evidence whether or not he should be released as an innocent person. (*People ex rel. Myers* v. *Briggs.*) Thus the due process issue inherent in holding pending charges indefinitely over one who will not have a chance to prove his innocense is not present in this case.

We must consider the results of an "innocent only" hearing with our above construction of the MHDD Code and section 5-2-2 of the Unified Code of Corrections. If, as a result of that hearing, defendant is found innocent, then his unfitness to stand trial should not subject him to involuntary commitment under the MHDD Code because the criminal charge against him could not be used to establish his dangerousness as the basis for an involuntary commitment. However, the fact that he has been found innocent of the particular charge would not prevent his civil commitment under the provisions of the MHDD Code.

In this case the trial court, following a hearing under the Mental Health Code of 1967 to determine whether Lang was committable, determined that Lang was not committable. The judge extensively analyzed the evidence and the law and

concluded that Lang was not a person in need of mental treatment as defined in the Code because he was not afflicted with a mental disorder. The court did find, however, that there was substantial evidence concerning the dangerous traits which Lang possessed and concluded that he had "clearly manifested dangerous behavior." The trial court cited testimoy of various experts which supported this conclusion. This testimony, coupled with the fact that Lang's trial had established that he had committed the homicide, which the evidence indicated was quite brutal, is sufficient to support an involuntary commitment under the provisions of the MHDD Code, which became effective January 1, 1979.

Under section 5-2-2(b) of the Unified Code of Corrections (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-2(b)), a defendant who has been hospitalized shall be returned to the court every 12 months for a reexamination of the determination of his unfitness to stand trial and, if he is found unfit, to determine whether he still requires hospitalization. Since it has been more than a year since Lang was found unfit to stand trial, and more than a year since a hearing was held concerning his involuntary commitment and admission to bail, we remand this cause to the circuit court of Cook County for a hearing as provided in section 5-2-2(b) of the Unified Code of Corrections to determine whether he is still unfit to stand trial and, if so, whether he still has the dangerous characteristics required for involuntary admission under sections 1-119 and 3-700 *et seq.* of the MHDD code (Ill. Rev. Stat., 1978 Supp., ch. 91½, pars. 1-119, 3-700 *et seq.*). If Lang is found to be unfit to stand trial for other than a physical condition, and to be a person subject to involuntary admission, then the circuit court of Cook County is directed to enter an order finding him subject to involuntary admission and to make the appropriate dispositional orders under article VIII of the MHDD Code (Ill. Rev. Stat., 1978 Supp., ch. 91½, par. 3-800 *et seq.*). If Lang is found unfit to stand trial but dangerous and thus not subject to involuntary commitment, the

court may release him on bail. However in doing so it should specify conditions of bail under section 5-2-2(a) of the Unified Code of Corrections (Ill. Rev. Stat. 1977, ch. 38, par. 1005-2-2(a)) which prescribe appropriate treatment by the Department of Mental Health and Developmental Disabilities in an attempt to establish Lang's fitness to be tried. As noted above we are aware that at the present time the General Assembly is considering Senate Bill 0133, which proposes amendments to the Unified Code of Corrections that involve certain procedural changes in the determination of fitness to stand trial and the subsequent handling of those found to be unfit. In making the determinations which we have directed in this opinion the procedural safeguards provided by the applicable statutes are to be followed.

The appellate court is affirmed as to that part of its judgment (1) which vacated the circuit court's order of October 3, 1977, requiring the Department to file a petition detailing a program for the defendant; (2) as to that part of its judgment which vacated the writ of *mandamus* entered against the Director of Mental Health and Developmental Disability and which reversed the circuit court's order denying the Director's motion to vacate, alter or amend that order, and (3) as to that part of its judgment affirming the circuit court's denial of a petition for a writ of *habeas corpus*. The judgment of the appellate court is reversed insofar as that judgment reset special conditions of the defendant's bail. This cause is remanded to the circuit court of Cook County with directions to conduct further proceedings in accordance with this opinion.

Appellate court affirmed in part and reversed in part; cause remanded, with directions.

June 29, 1979

Mr. Mark B. Epstein
Epstein and Kesselman
Attorneys at Law
134 N. LaSalle Street
Chicago, IL 60602

In re: *People State of Illinois, et al., etc., appellees,* vs. *Donald Lang, appellant.* Nos. 51051 & 51148 Cons.

Dear Mr. Epstein:

The Supreme Court today made the following announcement concerning the above entitled cause:

> The motion by Julius Lang, Conservator of Donald Lang, that Donald Lang be transferred from the Cook County Jail to the Illinois Department of Mental Health and Developmental Disabilities, and for this Court or the Circuit Court to monitor treatment of Donald Lang in accordance with this Court's opinion is denied without prejudice to renewing said motion in the Circuit Court of Cook County
>
> The petitions for rehearing are denied.

I am enclosing pages eight and twelve of the opinion as modified upon denial of petitions for rehearing.

Very truly yours,

Clerk of the Supreme Court

CLW:jac
cc: James J. Doherty
Wm. J. Scott
Bernard Carey
Joseph J. Schneider
Gilbert S. Marchman

July 13, 1979

Hon. William J. Scott
Attorney General
160 N. LaSalle Street—#1500
Chicago, IL 60601

In re: *People State of Illinois, appellee,* vs. *Donald Lang, appellant* (Robert A. deVito, M.D., Director, Illinois Department of Mental Health and Developmental Disabilities, appellee) Nos. 51051-51148 Cons.

Dear Mr. Scott:

This office has today received and filed an order entered by Justice Thomas E. Kluczynski staying the mandate in the above entitled cause pending disposition of a petition for writ of certiorari in the Supreme Court of the United States by appellee, Robert A. deVito, M.D.

Very truly yours,

Clerk of the Supreme Court

CLW:gn
cc—Hon. James J. Doherty
Public Defender of Cook County
Attys. Epstein and Kesselman

No. A-265

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT A. deVITO, DIRECTOR OF MENTAL HEALTH AND DEVELOPMENT DISABILITIES, ET AL.,

Petitioners,

v.

DONALD LANG

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 26, 1979.

/S/ JOHN PAUL STERNS
Associate Justice of the Supreme
Court of the United States

Dated this 27th day of September, 1979.

AN ACT to add Sections 102-21 and 104-10 through 104-29 to and to amend Section 113-3 and the title of Article 104 of the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended, and to add Section 5-2-5 to and to repeal Sections 5-2-1 and 5-2-2 of the "Unified Code of Corrections", approved July 26, 1972, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 102-21 and Sections 104-10 through 104-29 are added to the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended, and Section 113-3 and the title of Article 104 thereof are amended, the added and amended Sections and amended title to read as follows:

(Ch. 38, new par. 102-21)

Sec. 102-21. (a) "Clinical psychologist" means a psychologist registered under the "Psychologist Registration Act" with the Department of Registration and Education who meets the following qualifications:

(1) has a doctoral degree from a regionally accredited university, college, or professional school, and has 2 years of supervised experience in health services of which at least one year is postdoctoral and one year is in an organized health service program; or

(2) has a graduate degree in psychology from a regionally accredited university or college, and not less than 6 years of experience as a psychologist with at least 2 years of supervised experience in health services.

(b) "Court-appointed examiner" means a social worker registered under the "Social Workers Registration Act" with the Department or Registration and Education who has a master's degree in social work and at least 3 years of clinical training and experience in the evaluation and treatment of mental illness which has been acquired subsequent to any training and experience which constituted a part of the degree program.

ARTICLE 104.

FITNESS FOR TRIAL, TO PLEAD OR TO BE SENTENCED

(Ch. 38, new par. 104-10)

Sec. 104-10. Presumption of Fitness; Fitness Standard. A defendant is presumed to be fit to stand trial or to plead, and be sentenced. A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense.

(Ch. 38, new par. 104-11)

Section 104-11. Raising Issue; Burden; Fitness Motions. (a) The issue of the defendant's fitness for trial, to plead, or to be sentenced may be raised by the defense, the State or the Court at any appropriate time before a plea is entered or before, during, or after trial. When a bona fide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further.

(b) Upon request of the defendant that a qualified expert be appointed to examine him or her to determine prior to trial if a bona fide doubt as to his or her fitness to stand trial may be raised, the court, in its discretion, may order an appropriate examination. However, no order entered pursuant to this subsection shall prevent further proceedings in the case. An expert so appointed shall examine the defendant and make a report as provided in Section 104-15. Upon the filing with the court of a verified statement of services rendered, the court shall enter an order on the county board to pay such expert a reasonable fee stated in the order.

(c) When a bona fide doubt of the defendant's fitness has been raised, the burden of proving that the defendant is fit by a preponderance of the evidence and the burden of going forward with the evidence are on the State. However, the court may call its own witnesses and conduct its own inquiry.

(d) Following a finding of unfitness, the court may hear and rule on any pretrial motion or motions if the defendant's presence is not essential to a fair determination of the issues. A motion may be reheard upon a showing that evidence is available which was not available, due to the defendant's unfitness, when the motion was first decided.

(Ch. 38, New par. 104-12)

Sec. 104-12. Right to Jury.) The issue of the defendant's fitness may be determined in the first instance by the court or by a jury. The defense or the State may demand a jury or the court on its own motion may order a jury. However, when the issue is raised after trial has begun or after conviction but before sentencing, or when the issue is to be redetermined under Section 104-20 or 104-27, the issue shall be determined by the court.

(Ch. 38, new par. 104-13)

Sec. 104-13. Fitness Examination.) (a) When the issue of fitness involves the defendant's mental condition, the court shall order an examination of the defendant by one or more licensed physicians, clinical psychologists, or psychiatrists chosen by the court.

(b) If the issue of fitness involves the defendant's physical condition, the court shall appoint one or more physicians and in addition, such other experts as it may deem appropriate to examine the defendant and to report to the court regarding the defendant's condition.

(c) An examination ordered under this Section shall be given at the place designated by the person who will conduct the examination, except that if the defendant is being held in custody, the examination shall take place at such location as the court directs. If the defendant fails to keep appointments

without reasonable cause or if the person conducting the examination reports to the court the diagnosis requires hospitalization or extended observation, the court may order the defendant admitted to an appropriate facility for an examination, other than a screening examination, for not more than 7 days. The court may, upon a showing of good cause, grant an additional 7 days to complete the examination.

(d) Release on bail or on recognizance shall not be revoked and an application therefor shall not be denied on the grounds that an examination has been ordered.

(e) Upon request by the defense and if the defendant is indigent, the court may appoint, in addition to the expert or experts chosen pursuant to subsection (a) of this Section, a qualified expert selected by the defendant to examine him and to make a report as provided in Section 104-15. Upon the filing with the court of a verified statement of services rendered, the court shall enter an order on the county board to pay such expert a reasonable fee stated in the order.

(Ch. 38, new par. 104-14)

Sec. 104-14. Use of Statements Made During Examination or Treatment.) (a) Statements made by the defendant and information gathered in the course of any examination or treatment ordered under Section 104-13, 104-17 or 104-20 shall not be admissible against the defendant unless he raises the defense of insanity or the defense of drugged or intoxicated condition, in which case they shall be admissible only on the issue of whether he was insane, drugged, or intoxicated. The refusal of the defendant to cooperate in such examinations shall not preclude the raising of the aforesaid defenses but shall preclude the defendant from offering expert evidence or testimony tending to support such defenses if the expert evidence or testimony is based upon the expert's examination of the defendant.

(b) Except as provided in paragraph (a) of this Section no statement made by the defendant in the course of any examination or treatment ordered under Section 104-13, 104-17 or 104-20 which relates to the crime charged or to other criminal acts shall be disclosed by persons conducting the examination or the treatment, except to members of the examining or treating team, without the informed written consent of the defendant, who is competent at the time of giving such consent.

(c) The court shall advise the defendant of the limitations on the use of any statements made or information gathered in the course of the fitness examination or subsequent treatment as provided in this Section. It shall also advise him that he may refuse to cooperate with the person conducting the examination, but that his refusal may be admissible into evidence on the issue of his mental or physical condition.

(Ch. 38, new par. 104-15)

Sec. 104-15. Report.) (a) The person or persons conducting an examination of the defendant, pursuant to paragraph (a) or (b) of Section 104-13 shall submit a written report to the court, the State, and the defense within 30 days of the date of the order. The report shall include:

(1) A diagnosis and an explanation as to how it was reached and the facts upon which it is based;

(2) A description of the defendant's mental or physical disability, if any; its severity; and an opinion as to whether and to what extent it impairs the defendant's ability to understand the nature and purpose of the proceedings against him or to assist in his defense, or both.

(b) If the report indicates that the defendant is not fit to stand trial or to plead because of a disability, the report shall include an opinion as to the likelihood of the defendant attaining fitness within one year if provided with a course of treatment. If the person or persons preparing the report are

unable to form such an opinion, the report shall state the reasons therefor. The report may include a general description of the type of treatment needed and of the least physically restrictive form of treatment therapeutically appropriate.

(c) The report shall indicate what information, if any, contained therein may be harmful to the mental condition of the defendant if made known to him.

(Ch. 38, new par. 104-16)

Sec. 104-16. Fitness Hearing. (a) The court shall conduct a hearing to determine the issue of the defendant's fitness within forty-five days of receipt of the final written report of the person or persons conducting the examination or upon conclusion of the matter then pending before it, subject to continuances allowed pursuant to Section 114-4 of this Act.

(b) Subject to the rules of evidence, matters admissible on the issue of the defendant's fitness include, but are not limited to, the following:

(1) The defendant's knowledge and understanding of the charge, the proceedings, the consequences of a plea, judgment or sentence, and the functions of the participants in the trial process;

(2) The defendant's ability to observe, recollect and relate occurrences, especially those concerning the incidents alleged, and to communicate with counsel;

(3) The defendant's social behavior and abilities; orientation as to time and place; recognition of persons, places and things; and performance of motor processes.

(c) The defendant has the right to be present at every hearing on the issue of his fitness. The defendant's presence may be waived only if there is filed with the court a certificate stating that the defendant is physically unable to be present and the reasons therefor. The certificate shall be signed by a

licensed physician who, within 7 days, has examined the defendant.

(d) On the basis of the evidence before it, the court or jury shall determine whether the defendant is fit to stand trial or to plead. If it finds that the defendant is unfit, the court or the jury shall determine whether there is substantial probability that the defendant, if provided with a course of treatment, will attain fitness within one year. If the court or the jury finds that there is not a substantial probability, the court shall proceed as provided in Section 104-23. If such probability is found or if the court or the jury is unable to determine whether a substantial probability exists, the court shall order the defendant to undergo treatment for the purpose of rendering him fit. In the event that a defendant is ordered to undergo treatment when there has been no determination as to the probability of his attaining fitness, the court shall conduct a hearing as soon as possible following the receipt of the report filed pursuant to paragraph (d) of Section 104-17, unless the hearing is waived by the defense, and shall make a determination as to whether a substantial probability exists.

(e) An order finding the defendant unfit is a final order for purposes of appeal by the State or the defendant.

(Ch. 38, new par. 104-17)

Sec. 104-17. Commitment for Treatment; Treatment Plan.) (a) If the defendant is eligible to be or has been released on bail or on his own recognizance, the court shall select the least physically restrictive form of treatment therapeutically appropriate and consistent with the treatment plan.

(b) If the defendant's disability is mental, the court may order him placed for treatment in the custody of the Department of Mental Health and Developmental Disabilities, or the court may order him placed in the custody of any other appropriate public or private mental health facility or treatment

program which has agreed to provide treatment to the defendant. The placement may be ordered either on an inpatient or an outpatient basis.

(c) If the defendant's disability is physical, the court may order him placed under the supervision of the Division of Vocational Rehabilitation which shall place and maintain the defendant in a suitable treatment facility or program, or the court may order him placed in an appropriate public or private facility or treatment program which has agreed to provide treatment to the defendant. The placement may be ordered either on an inpatient or an outpatient basis.

(d) Within 30 days of entry of an order to undergo treatment, the person supervising the defendant's treatment shall file with the court, the State, and the defense a report assessing the facility's or program's capacity to provide appropriate treatment for the defendant and indicating his opinion as to the probability of the defendant's attaining fitness within a period of one year from the date of the finding of unfitness. If the report indicates that there is a substantial probability that the defendant will attain fitness within the time period, the treatment supervisor shall also file a treatment plan which shall include:

(1) A diagnosis of the defendant's disability;

(2) A description of treatment goals with respect to rendering the defendant fit, a specification of the proposed treatment modalities, and an estimated timetable for attainment of the goals;

(3) An identification of the person in charge of supervising the defendant's treatment.

(Ch. 38, new par. 104-18)

Sec. 104-18. Progress Reports.) (a) The treatment supervisor shall submit a written progress report to the court, the State, and the defense:

(1) At least 7 days prior to the date for any hearing on the issue of the defendant's fitness;

(2) Whenever he believes that the defendant has attained fitness;

(3) Whenever he believes that there is not a substantial probability that the defendant will attain fitness, with treatment, within one year from the date of the original finding of unfitness.

(b) The progress report shall contain:

(1) The clinical findings of the treatment supervisor and the facts upon which the findings are based:

(2) The opinion of the treatment supervisor as to whether the defendant has attained fitness or as to whether the defendant is making progress, under treatment, toward attaining fitness within one year from the date of the original finding of unfitness:

(3) If the defendant is receiving medication, information from the prescribing physician indicating the type, the dosage and the effect of the medication on the defendant's appearance, actions and demeanor.

(Ch. 38, new par. 104-19)

Sec. 104-19. Records.) Any report filed of record with the court concerning diagnosis, treatment or treatment plans made pursuant to this Article shall not be placed in the defendant's court record but shall be maintained separately by the clerk of the court and shall be available only to the court or an appellate court, the State and the defense, a facility or program which is providing treatment to the defendant pursuant to an order of the court or such other persons as the court may direct.

(Ch. 38, new par. 104-20)

Sec. 104-20. Ninety-Day Hearings; Continuing Treatment.) (a) Upon entry or continuation of any order to undergo

treatment, the court shall set a date for hearing to reexamine the issue of the defendant's fitness not more than 90 days thereafter. In addition, whenever the court receives a report from the supervisor of the defendant's treatment pursuant to subparagraph (2) or (3) of paragraph (a) of Section 104-18, the court shall forthwith set the matter for hearing. On the date set or upon conclusion of the matter then pending before it, the court, sitting without a jury, shall conduct a hearing, unless waived by the defense, and shall determine:

(1) Whether the defendant is fit to stand trial or to plead; and if not,

(2) Whether the defendant is making progress under treatment toward attainment of fitness within one year from the date of the original finding of unfitness.

(b) If the court finds the defendant to be fit pursuant to this Section, the court shall set the matter for trial; provided that if the defendant is in need of continued care or treatment and the supervisor of the defendant's treatment agrees to continue to provide it, the court may enter any order it deems appropriate for the continued care or treatment of the defendant by the facility or program pending the conclusion of the criminal proceedings.

(c) If the court finds that the defendant is still unfit but that he is making progress toward attaining fitness, the court may continue or modify its original treatment order entered pursuant to Section 104-17.

(d) If the court finds that the defendant is still unfit and that he is not making progress toward attaining fitness such that there is not a substantial probability that he will attain fitness within one year from the date of the original finding of unfitness, the court shall proceed pursuant to Section 104-23. However, if the defendant is in need of continued care and treatment and the supervisor of the defendant's treatment

agrees to continue to provide it, the court may enter any order it deems appropriate for the continued care or treatment by the facility or program pending the conclusion of the criminal proceedings.

(Ch. 38, new par. 104-21)

Sec. 104-21. Medication. (a) A defendant who is receiving psychotropic drugs or other medications under medical direction is entitled to a hearing on the issue of his fitness while under medication. If the court finds a defendant, who is receiving such medication to be fit but also finds that it is probable that the defendant will be fit without the use of such medication if he receives or continues in treatment, the court may order the defendant to undergo or to continue treatment within the time limits prescribed by this Article. The court shall not order such defendant to undergo or continue treatment under this Section if the defendant wishes to proceed while under medication, except that the court may make such orders as it deems appropriate under paragraph (b) of this Section.

(b) Whenever a defendant who is receiving medication under medical direction is transferred between a place of custody and a treatment facility or program, a written report from the prescribing physician shall accompany the defendant. The report shall state the type and dosage of the defendant's medication and the duration of the prescription. The chief officer of the place of custody or the treatment supervisor at the facility or program shall insure that such medication is provided according to the directions of the prescribing physician or until superseded by order of a physician who has examined the defendant.

(Ch. 38, new par. 104-22)

Sec. 104-22. Trial with special provisions and assistance.) (a) On motion of the defendant, the State or on the court's own motion, the court shall determine whether special provisions or

assistance will render the defendant fit to stand trial as defined in Section 104-10.

(b) Such special provisions or assistance may include but are not limited to:

(1) Appointment of qualified translators who shall simultaneously translate all testimony at trial into language understood by the defendant.

(2) Appointment of experts qualified to assist a defendant who because of a disability is unable to understand the proceedings or communicate with his or her attorney.

(c) The case may proceed to trial only if the court determines that such provisions or assistance compensate for a defendant's disabilities so as to render the defendant fit as defined in Section 104-10. In such cases the court shall state for the record the following:

(1) The qualifications and experience of the experts or other persons appointed to provide special assistance to the defendant;

(2) The court's reasons for selecting or appointing the particular experts or other persons to provide the special assistance to the defendant;

(3) How the appointment of the particular expert or other persons will serve the goal of rendering the defendant fit in view of the appointee's qualifications and experience, taken in conjunction with the particular disabilities of the defendant; and

(4) Any other factors considered by the court in appointing that individual.

(Ch. 38, new par. 104-23)

Sec. 104-23. Unfit defendants. Cases involving an unfit defendant who demands a discharge hearing or a defendant

who cannot become fit to stand trial and for whom no special provisions or assistance can compensate for his disability and render him fit shall proceed in the following manner:

(a) At any time after a finding of unfitness to enter a plea or to stand trial, a defendant or the attorney for the defendant may move for a discharge hearing pursuant to the provisions of Section 104-25. The speedy trial provisions of Section 103-5 shall commence with the filing of a motion for a discharge hearing.

(b) If at any time the court determines that there is not a substantial probability that the defendant will become fit to stand trial or to plead within one year from the date of the original finding of unfitness, or if at the end of one year from that date the court finds the defendant still unfit and for whom no special provisions or assistance can compensate for his disabilities and render him fit, the speedy trial provisions of Section 103-5 shall commence to run and the State shall request the court:

(1) To set the matter for hearing pursuant to Section 104-25 unless a hearing has already been held pursuant to paragraph (a) of this Section; or

(2) To release the defendant from custody and unless the State brings the defendant to trial pursuant to Section 104-25 within 160 days thereafter, unless delay is occasioned by the defendant, to dismiss with prejudice the charges against him; or

(3) To remand the defendant to the custody of the Department of Mental Health and Developmental Disabilities and order a hearing to be conducted pursuant to the provisions of the Mental Health and Developmental Disabilities Code, as now or hereafter amended. If the defendant is committed to the Department of Mental Health and Developmental Disabilities pursuant to such hearing, the court having jurisdiction over the criminal matter shall dismiss the charges against the

defendant, with the leave to reinstate. In such cases the Department of Mental Health and Developmental Disabilities shall notify the court, the State's attorney and the defense attorney upon the discharge of the defendant. A former defendant so committed shall be treated in the same manner as any other civilly committed patient for all purposes including admission, selection of the place of treatment and the treatment modalities, entitlement to rights and privileges, transfer, and discharge. A defendant who is not committed shall be remanded to the court having jurisdiction of the criminal matter of disposition pursuant to subparagraph (1) or (2) of paragraph (b) of this Section.

(Ch. 38, new par. 104-24)

Sec. 104-24. Time Credit. Time spent in custody pursuant to orders issued under Section 104-17 or 104-20 or pursuant to a commitment to the Department of Mental Health and Developmental Disabilities following a finding of unfitness or incompetency under prior law, shall be credited against any sentence imposed on the defendant in the pending criminal case or in any other case arising out of the same conduct.

(Ch. 38, new par. 104-25)

Sec. 104-25. Discharge hearing. (a) As provided for in paragraph (a) of Section 104-23 and subparagraph (1) of paragraph (b) of Section 104-23 a hearing to determine the sufficiency of the evidence shall be held. Such hearing shall be conducted by the court without a jury. The State and the defendant may introduce evidence relevant to the question of defendant's guilt of the crime charged.

The court may admit hearsay or affidavit evidence on secondary matters such as testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, court and business records, and public documents.

(b) If the evidence does not prove the defendant guilty beyond a reasonable doubt, or if the defendant is found not guilty by reason of insanity the court shall enter a judgment of acquittal.

(c) If the discharge hearing does not result in an acquittal of the charge the defendant may be remanded for further treatment and the one year time limit set forth in Section 104-23 shall be extended as follows:

(1) If the most serious charge upon which the State sustained its burden of proof was a Class 1 or Class X felony, the treatment period may be extended up to a maximum treatment period of 2 years; if a Class 2, 3, or 4 felony, the treatment period may be extended up to a maximum of 15 months;

(2) If the State sustained its burden of proof on a charge of murder, the treatment period may be extended up to a maximum treatment period of 5 years.

(d) Transcripts of testimony taken at a discharge hearing may be admitted in evidence at a subsequent trial of the case, subject to the rules of evidence, if the witness who gave such testimony is legally unavailable at the time of the subsequent trial.

(e) If the court fails to enter an order of acquittal the defendant may appeal from such judgment in the same manner provided for an appeal from a conviction in a criminal case.

(f) At the expiration of an extended period of treatment ordered pursuant to this Section:

(1) Upon a finding that the defendant is fit or can be rendered fit consistent with Section 104-22, the court may proceed with trial.

(2) If the defendant is not fit to stand trial, the court shall order a hearing to be conducted pursuant to the provisions of

the Mental Health and Developmental Disabilities Code of 1978. If the defendant is committed to the Department of Mental Health and Developmental Disabilities, the court having jurisdiction over the criminal matter shall dismiss the charges against the defendant, with leave to reinstate, where such order has not previously been entered. A person committed in this manner shall be treated in the same manner as any other civilly committed patient.

(3) If the defendant is not committed pursuant to the hearing provided for in subparagraph (2), the court shall determine whether he or she is reasonably expected to inflict serious physical harm upon himself or herself or others in the near future or constitutes a serious threat to the public safety. If so found, the defendant shall be remanded to the Department of Mental Health and Developmental Disabilities or the Department of Vocational Rehabilitation for further treatment for a period not to exceed the period to which he or she was originally subject to under this Section. Such treatment shall continue to effort to render the defendant fit to stand trial and shall be designed to allow the defendant to be released from custody, consistent with this paragraph.

(4) If the defendant is not committed pursuant to this Section, he or she shall be released.

(5) In no event may the treatment period be extended to exceed the maximum sentence to which a defendant would have been subject had he or she been convicted in a criminal proceeding. For purposes of this Section, the maximum sentence shall be determined by Section 5-8-1 of the "Unified Code of Corrections", excluding any sentence of natural life.

(Ch. 38, new par. 104-26)

Sec. 104-26. Disposition of Defendants suffering disabilities.) (a) A defendant convicted following a trial conducted under the provisions of Section 104-22 shall not be sentenced before a written presentence report of investigation is presented to and considered by the court. The presentence report shall be prepared pursuant to Sections 5-3-2, 5-3-3 and 5-3-4 of the Unified Code of Corrections, as now or hereafter amended, and shall include a physical and mental examination unless the court finds that the reports of prior physical and mental examinations conducted pursuant to this Article are adequate and recent enough so that additional examinations would be unnecessary.

(b) A defendant convicted following a trial under Section 104-22 shall not be subject to the death penalty.

(c) A defendant convicted following a trial under Section 104-22 shall be sentenced according to the procedures and dispositions authorized under the Unified Code of Corrections, as now or hereafter amended, subject to the following provisions:

(1) The court shall not impose a sentence of imprisonment upon the offender if the court believes that because of his disability a sentence of imprisonment would not serve the ends of justice and the interests of society and the offender or that because of his disability a sentence of imprisonment would subject the offender to excessive hardship. In addition to any other conditions of a sentence of conditional discharge or probation the court may require that the offender undergo treatment appropriate to his mental or physical condition.

(2) After imposing a sentence of imprisonment upon an offender who has a mental disability, the court may remand him to the custody of the Department of Mental Health and Developmental Disabilities and order a hearing to be conducted pursuant to the provisions of the Mental Health and Developmental Disabilities Code, as now or hereafter amended. If the offender is committed

following such hearing, he shall be treated in the same manner as any other civilly committed patient for all purposes except as provided in this Section. If the defendant is not committed pursuant to such hearing, he shall be remanded to the sentencing court for disposition according to the sentence imposed.

(3) If the court imposes a sentence of imprisonment upon an offender who has a mental disability but does not proceed under subparagraph (2) of paragraph (c) of this Section, it shall order the Department of Corrections to proceed pursuant to Section 3-8-5 of the Unified Code of Corrections, as now or hereafter amended.

(4) If the court imposes a sentence of imprisonment upon an offender who has a physical disability, it may authorize the Department of Corrections to place the offender in a public or private facility which is able to provide care or treatment for the offender's disability and which agrees to do so.

(5) When an offender is placed with the Department of Mental Health and Developmental Disabilities or another facility pursuant to subparagraph (2) or (4) of this paragraph (c), the Department or private facility shall not discharge or allow the offender to be at large in the community without prior approval of the court. The offender shall accrue good time and shall be eligible for parole in the same manner as if he were serving his sentence within the Department of Corrections. When the offender no longer requires hospitalization, care, or treatment, the Department of Mental Health and Developmental Disabilities or the facility shall transfer him, if his sentence has not expired, to the Department of Corrections. If an offender is transferred to the Department of Corrections, the Department of Mental Health and Developmental Disabilities shall transfer to the Department of Corrections all related records pertaining to length of

custody and treatment services provided during the time the offender was held.

(6) The Department of Corrections shall notify the Department of Mental Health and Developmental Disabilities or a facility in which an offender has been placed pursuant to subparagraph (2) or (4) of paragraph (c) of this Section of the expiration of his sentence. Thereafter, an offender in the Department of Mental Health and Developmental Disabilities shall continue to be treated pursuant to his commitment order and shall be considered a civilly committed patient for all purposes including discharge. An offender who is in a facility pursuant to subparagraph (4) of paragraph (c) of this Section shall be informed by the facility of the expiration of his sentence, and shall either consent to the continuation of his care or treatment by the facility or shall be discharged.
(Ch. 38, new par. 104-27)

Sec. 104-27. Defendants Found Unfit Prior to this Article: Reports; Appointment of Counsel.) (a) Within 180 days after the effective date of this Article, the Department of Mental Health and Developmental Disabilities shall compile a report on each defendant under its custody who was found unfit or incompetent to stand trial or to be sentenced prior to the effective date of this Article. Each report shall include the defendant's name, indictment and warrant numbers, the county of his commitment, the length of time he has been hospitalized, the date of his last fitness hearing, and a report on his present status as provided in Section 104-18.

(b) The reports shall be forwarded to the Administrative Office of the Illinois Courts which shall distribute copies thereof to the chief judge of the court in which the criminal charges were originally filed, to the state's attorney and the public defender of the same county, and to the defendant's attorney of record, if any. Notice that the report has been delivered shall be given to the defendant.

(c) Upon receipt of the report, the chief judge shall appoint the public defender or other counsel for each defendant

who is not represented by counsel and who is indigent pursuant to Section 113-3 of this Act, as now or hereafter amended. The court shall provide the defendant's counsel with a copy of the report.

(Ch. 38, new par. 104-28)

Sec. 104-28. Disposition of Defendants Found Unfit Prior to this Article.) (a) Upon reviewing the report, the court shall determine whether the defendant has been in the custody of the Department of Mental Health and Developmental Disabilities for a period of time equal to the length of time that the defendant would have been required to serve, less good time, before becoming eligible for parole or mandatory supervised release had he been convicted of the most serious offense charged and had he received the maximum sentence therefor. If the court so finds, it shall dismiss the charges against the defendant. If the defendant has not been committed pursuant to the Mental Health and Developmental Disabilities Code, the court shall order him discharged or shall order a hearing to be conducted forthwith pursuant to the provisions of the Code. If the defendant was committed pursuant to the Code, he shall continue to be treated pursuant to his commitment order and shall be considered a civilly committed patient for all purposes including discharge.

(b) If the court finds that a defendant has been in the custody of the Department of Mental Health and Developmental Disabilities for a period less than that specified in paragraph (a) of this Section, the court shall conduct a hearing pursuant to Section 104-20 forthwith to redetermine the issue of the defendant's fitness to stand trial or to plead. If the defendant is fit, the matter shall be set for trial. If the court finds that the defendant is unfit, it shall proceed pursuant to Section 104-20 or 104-23, provided that a defendant who is still

unfit and who has been in the custody of the Department of Mental Health and Developmental Disabilities for a period of more than one year from the date of the finding of unfitness shall be immediately subject to the provisions of Section 104-23.

(Ch. 38, new par. 104-29)

Sec. 104-29. In the event of any conflict between this Article and the "Mental Health and Developmental Disabilities Code", the provisions of this Article shall govern.

(Ch. 38, par. 113-3)

Sec. 113-3. (a) Every person charged with an offense shall be allowed counsel before pleading to the charge. If the defendant desires counsel and has been unable to obtain same before arraignment the court shall recess court or continue the cause for a reasonable time to permit defendant to obtain counsel and consult with him before pleading to the charge.

(b) In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. If there is no Public Defender in the county or if the defendant requests counsel other than the Public Defender and the court finds that the rights of the defendant will be prejudiced by the appointment of the public defender, the court shall appoint as counsel a licensed attorney at law of this State, except that in a county having a population of 1,000,000 or more the Public Defender shall be appointed as counsel in all misdemeanor cases where the defendant is indigent and desires counsel unless the case involves multiple defendants, in which case the court may appoint counsel other than the Public Defender for the additional defendants. The court shall require an affidavit signed by any defendant who requests court-appointed counsel. Such affidavit shall be in the form established by the Administrative Office of Illinois Courts containing sufficient information to ascertain the assets and liabilities of that defendant. The

Court may direct the Clerk of the Circuit Court to assist the defendant in the completion of the affidavit. Any person who knowingly files such affidavit containing false information concerning his assets and liabilities shall be liable to the county is the case, in which such false affidavit is filed, as pending for the reasonable value of the services rendered by the public defender or other court-appointed counsel in the case to the extent that such services were unjustly or falsely procured.

(c) Upon the filing with the court of a verified statement of services rendered the court shall order the county treasurer of the county of trial to pay counsel other than the Public Defender a reasonable fee. In counties with a population of not more than 2,000,000, the court shall consider all relevant circumstances, including but not limited to the time spent while court is in session, other time spent in representing the defendant, and expenses reasonably incurred by counsel. In counties with a population greater than 2,000,000, the court shall order the county treasurer of the county of trial to pay counsel other than the Public Defender a reasonable fee stated in the order and based upon a rate of compensation of not more than $30 for each hour spent while court is in session and not more than $20 for each hour otherwise spent representing a defendant, and such compensation shall not exceed $150 for each defendant represented in misdemeanor cases and $1,000 in felony cases, in addition to expenses reasonably incurred as hereinafter in this Section provided, except that, in extraordinary circumstances, payment in excess of the limits herein stated may be made if the trial court certifies that such payment is necessary to provide fair compensation for protracted representation, and the amount of the excess payment is approved by the Chief Judge of the Circuit. A trial court may entertain the filing of this verified statement before the termination of the cause, and may order the provisional payment of sums during the pendency of the cause.

(d) In capital cases, in addition to counsel, if the court determines that the defendant is indigent the court may, upon the filing with the court of a verified statement of services rendered, order the county treasurer of the county of trial to pay necessary expert witnesses for defendant reasonable compensation stated in the order not to exceed $250 for each defendant.

(e) If the court in any county having a population greater than 1,000,000 determines that the defendant is indigent the court may, upon the filing with the court of a verified statement of such expenses, order the county treasurer of the county of trial, in such counties having a population greater than 1,000,000 to pay the general expenses of the trial incurred by the defendant not to exceed $50 for each defendant.

Section 2. Section 5-2-5 is added to the "Unified Code of Corrections", approved July 26, 1972, as amended, the added Section to read as follows:

(Ch. 38, new par. 1005-2-5)

Sec. 5-2-5. In any issue of determination of fitness of a defendant to plead, to stand trial, to be sentenced or to be executed, or in any issue related to insanity, a clinical psychologist as defined in paragraph (a) of Section 102-21 of the Code of Criminal Procedure of 1963 shall be deemed qualified to testify as an expert witness in the form of his opinion about the issue of fitness or insanity and shall not be restricted to testifying with regard to test results only.

(Ch. 38, repeals pars. 1005-2-1 and 1005-2-2)

Section 3. Sections 5-2-1 and 5-2-2 of the "Unified Code of Corrections", approved July 26, 1972, as amended, are repealed.

Section 4. This amendatory Act of 1979 takes effect upon its becoming a law.